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In The

Supreme Court of the United States

October Term, 1995

POLK COUNTY, IOWA, A MUNICIPAL CORPORATION; RAY SEARS, FORMER COUNTY ADMINISTRATOR OF POLK COUNTY; AND POLK COUNTY BOARD OF SUPERVISORS,

Petitioners,

vs.

ISAIAH BROWN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Court of Appeals erred when it held (en banc, 7-4 decision) that a government employee has a right under Title VII and the First Amendment to engage in group prayer and religious proselytizing while on duty at work, and be paid for the time spent praying and proselytizing?

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OPINIONS BELOW

The opinion for the United States Court of Appeals for the Eighth Circuit, *en banc*, is contained in the appendix and is found at 61 F.3d 650 (8th Cir. 1995). The opinion for the United States Court of Appeals for the Eighth Circuit (panel decision vacated by the above) is contained in the appendix and is found at 37 F.3d 404 (8th Cir. 1994). The opinion of the United States District Court for the Southern District of Iowa is contained in the appendix and is found at 832 F.Supp. 1305 (S.D. Iowa 1993). The petition for rehearing and order denying the same are contained in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 31, 1995. An order was entered granting an extension of time in which to file a petition for rehearing. On August 14, 1995, petitioners filed a petition for rehearing. On September 21, 1995, the Eighth Circuit denied the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. 42 U.S.C. §2000e(j) reads:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he (sic) is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

3. 42 U.S.C. §2000e-2(a)(l) reads:

> It shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his (sic) compensation, terms, conditions, or privileges of employment, because of such individuals' race, color, religion, sex or national origin.

4. Section 31 of Article III of the Iowa Constitution provides:

> No extra compensation shall be made to any officer, public agent, or contractor, after the services shall have been rendered or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected by each branch in the general assembly.

5. Iowa Code §12B.4 provides:

A county treasurer shall be guilty of a serious misdemeanor for loaning out, or in any manner using for private purposes, state, county or other funds in the treasurer's hands.

6. Iowa Code §331.41(1)(n) provides:

The board [of supervisors] shall: comply with Chapters 12B and 12C in the management of public funds.

7. Iowa Code §216.6(1)(a) provides:

It shall be an unfair or discriminatory practice for any person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

STATEMENT OF THE CASE

Isaiah Brown was director of the Polk County, Iowa, Information Services Department and a born again Christian. He supervised 50 employees, managed a department budget of millions of dollars per year, and was responsible for all data processing functions in County government. App. 4-5.

After five years as the ISD director, he was fired in December 1990 because an accumulation of incidents led the County Administrator to conclude that Brown had lost control of his department. Those incidents included:

1. A departmental history, covering Brown's tenure as ISD chief, of being behind schedule on many projects.

2. The formation of an oversight committee to address the chronic problems experienced by Brown's department. (No other such committee had previously been formed in the County).

3. Chronic managerial shortcomings as reflected on Brown's yearly performance appraisals.

4. The complete reorganization of Brown's department upon the recommendation of an outside consultant who found problems with virtually all areas of the department.

5. A written reprimand in June of 1990 after an independent investigation by the County personnel department revealed that Brown

violated established County policy when he used, or allowed his employees to use, County resources for personal reasons.[1] He was reprimanded because he:

a. Ordered a County secretary to type his personal Bible study notes.

b. Engaged in group prayer with hourly employees before the start of the work day.

c. Engaged in group prayer while on duty at work.

d. Engaged in religious proselytizing while on duty at work.

e. Allowed employees under his supervision to engage in prayer sessions, Bible study sessions and religious counseling sessions while on duty at work.

6. A second written reprimand in November 1990 for two separate incidents of poor judgment.

7. The results of a second independent investigation by the personnel department in November 1990, which revealed that many employees in Brown's department were

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[1] The policy was contained in the Information Services Department policy manual. It stated, "Employees are not permitted to make use of county equipment, supplies, materials or vehicles for their personal use or the personal use of others." *See* Plaintiff's Trial Exhibit 64. The policy was consistent with the Iowa Constitution, Article III, §31, and the Code of Iowa, §§12B.4 and 331.401(1)(n), all of which preclude spending public funds for private purposes.

> using the County computer system for personal reasons such as storing and copying pornography, games and church-related religious materials. Brown was terminated after completion of this investigation.

App. 5-11.

The June 1990 written reprimand which Brown received for participating in and allowing religious activity while on duty at work was the focus of the Court of Appeals majority opinion.[2] It reads:

> This communication will serve as a written reprimand. The basis of this reprimand is found in the director's actions relating to his lack of judgment pertaining to his personal participation and/or his knowledge of employees' participating in activities that could be construed as the direct support of or the promotion of a religious organization or religious activities utilizing the resources of Polk County government. This is clearly unacceptable behavior on the part of an employee of Polk County and will not be tolerated. *Any* further founded activity will be met with an increased level of discipline.
>
> Mr. Brown will immediately cease any activities that could be considered to be religious proselytizing, witnessing, or counseling and will further cease to use County resources in any way that could be perceived to be supporting a religious activity or a religious organization. Further, Mr. Brown will insure a work environment

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[2] The County is not challenging the Court of Appeals' decision as to those " . . . constitutional claims that Mr. Brown did not link to his termination." App. 60.

> that is free of the types of activities as described in this document. (emphasis original). (Trial Ex. 22 and Z2.)

After he was fired, Brown filed a complaint with the Iowa Civil Rights Commission. He later sued in the U. S. District Court for the Southern District of Iowa, claiming federal jurisdiction for racial and religious discrimination claims under Title VII, 42 U.S.C. §1983, and pendent jurisdiction for state law racial and religious discrimination claims. After a week-long trial to the bench, he lost on all counts. Brown appealed to the U. S. Court of Appeals for the Eighth Circuit, and a split panel affirmed the District Court. App. 47-48.

Brown was granted rehearing en banc and the Eighth Circuit affirmed as to no racial discrimination, but reversed as to religious discrimination, finding that Title VII and its Iowa statutory counterpart had been violated.[3] The Court of Appeals focused exclusively upon the June, 1990, reprimand for religious activities while on duty at work. The Court approved parts (a) and (b) of the reprimand (ordering a secretary to type Bible study notes and holding group prayer meetings for employees before the start of the work day). The Court of Appeals held that those activities imposed an undue hardship upon the County and did not form the basis of a Title VII claim. App. 47-49, 54-56.

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[3] Brown also sued under Iowa code §216.6(1)(a), the Iowa counterpart to Title VII. The Court of Appeals held that the state statutory requirements were the same as Title VII requirements and its conclusions applied to both laws. App. 47-48. Likewise, this petition for certiorari applies to the state law decision.

However, the Court of Appeals held that parts (c) and (d) of the reprimand – prohibiting group prayer and proselytizing while on duty at work – were a Title VII violation.[4] The Eighth Circuit said that because the reprimand played a role in Brown's termination, his rights under Title VII and the First Amendment Free Exercise Clause had been violated. App. 56-60. Specifically, the Eighth Circuit held that while Title VII and the First Amendment were inextricably linked in a government employment claim of this kind, it would create no "undue hardship" for a government employer to tolerate employees' group prayer and religious proselytizing at work if the religious activities were "spontaneous and infrequent." App. 56-60.

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[4] The Court of Appeals ignored part (e) of the reprimand which dealt with Brown's allowing department employees to engage in prayer sessions and Bible Study sessions and religious counseling sessions while on duty at work. The Court did find though, that the Polk County Information Services Department offices were not a public forum or a limited public forum. App. 55.

REASONS FOR GRANTING THE WRIT

I. Whether the Court of Appeals erred when it held (en banc, 7-4 decision) that a government employee has a right under Title VII and the First Amendment to engage in group prayer and religious proselytizing while on duty at work, and be paid for the time spent praying and proselytizing?

A. An employee who, while on duty at work, engages in group prayer and religious proselytizing at random times during the work day, with the frequency and duration of the prayer and proselytizing selected solely by the employee, creates an undue hardship for his employer.

The opinion in *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (App. 46), creates a direct conflict with *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), and *Ansonia Board of Ed. v. Philbrook*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986), the two decisions of this Court which have considered the issues of reasonable accommodation and undue hardship in a Title VII religious discrimination setting.

The Eighth Circuit in this case has held that a public employer cannot enforce its prohibition of utilizing public resources for private reasons against an employee who, at times and for durations chosen unilaterally by the employee, engages in prayer and proselytizing while on duty at work. *Brown*, 61 F.3d at 656-58, App. 48-60. The necessary corollary of that holding is that a public employer must continue to pay a public employee who engages in on-the-job religious activities. That holding turns Title VII on its head, elevates the religious over the

secular and opens the public treasury to government employees who would rather spend their time from nine to five preaching and praying than providing for the effective and efficient delivery of public services.

As the Eighth Circuit correctly observed, the first question to be asked is whether a reasonable accommodation has been offered the employee. *Brown*, 61 F.3d at 654, App. 51-53. The County maintains that its pre-existing work-break/leave policy adequately accommodates an employee who wishes to engage in religious pursuits at non-working times during the work day (as opposed to those like Brown who insist upon doing so while on duty at work). Brown was entitled to a 15-minute break each morning and afternoon and a one-hour lunch each day. Additionally, he received 25 vacation days per year and five personal days per year that could be taken in 1/2 hour increments, all of which could be used for any purpose, nutritional, religious or secular. Unpaid leave was also available to Brown. App. 74-75. Such a policy in and of itself is a reasonable accommodation. *Philbrook* at 479 U.S. 70, 107 S.Ct. 372-73.

Assuming for purposes of argument that no accommodation has been offered to the employee the next inquiry is whether any accommodation could be offered without undue hardship to the employer. *Id.* In this part of its analysis the Eighth Circuit radically departed from accepted Title VII jurisprudence. The Eighth Circuit decision appears to be grounded upon the facts that Brown's

forays into workday piety were "infrequent"[5] and "spontaneous".[6] *Brown*, 61 F.3d at 656, App. 56. Because the on-the-job religious activities were infrequent, reasons the Eighth Circuit, the cost of paying for them would be "de minimis" and no undue hardship would be experienced by the County. *Id.* at 654-56, App. 56-58.

A cost is more than "de minimis" if it takes the form of lost efficiency in other jobs or higher wages. *Hardison*, 432 U.S. at 85, 97 S.Ct. at 2277. Thus, if the County got another employee to cover for Brown when Brown wished to engage in religious activities, there would be lost efficiency in that other employee's job. Also, if the County hired a new person or paid overtime to an existing employee to do Brown's work when he was praying or proselytizing, that would result in higher wages. Likewise, if the County simply let Brown ignore his work and pray and proselytize as he saw fit, this too would result in higher wages because the County would be paying Brown his regular wage for a religiously reduced work

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[5] Although the proselytizing by Brown occurred only once, 61 F.3d at 656, App. 56, the Eighth Circuit failed to mention that shortly after it occurred the once, Brown was disciplined by the reprimand at issue in this case and told not to let it happen again. *Brown*, 832 F.Supp. at 1309, App. 7-9. Had he not been reprimanded, his proselytizing could have occurred much more frequently. The prayer, Bible study and religious counseling by Brown and/or employees under his supervision, on the other hand, occurred as often as daily and lasted for periods in excess of 15 minutes at a time. (Tran. 401-405).

[6] The Eighth Circuit does not attempt to explain how spontaneity negates the existence of undue hardship. Common sense dictates that work interruptions at unplanned times are perhaps even more disruptive than scheduled work interruptions.

week. The County would in fact be paying Brown to pray instead of work and that is the very essence of undue hardship.

Necessarily resulting from the decision is this: Polk County's work policy forbidding the use of public resources for personal reasons can be enforced against all employees except those like Brown who wish to use public resources for personal *religious* reasons. This is contrary to the purposes of Title VII because "the paramount concern of Congress in enacting Title VII was the elimination of discrimination," *Hardison*, 432 U.S. at 85, 97 S.Ct. at 2277, and not the "unequal treatment of employees on the basis of their religion."[7] *Id.*

Another very real concern completely overlooked by the Eighth Circuit is the likelihood that a large employer such as Polk County "may have many employees whose religious observances" resemble those of the plaintiff, thus making the impact of the observances more than "de minimis" if it were not so already. *Id.* If all 800 Polk County employees spent just one-half of one percent of each 40-hour work week engaged in prayer or proselytizing, and if each employee was paid an average of $20 per hour in salary and benefits, then the undue burden upon the County taxpayers over a 50-week work year would be 8,000 hours of lost work at a cost of $160,000.

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[7] The majority decision of the en banc Court of Appeals is made all the more difficult to understand when one considers that its author, the Honorable Morris S. Arnold, a member of the Eighth Circuit panel which first heard the appeal, did not find a Title VII violation when he dissented to the panel decision. *Brown*, 37 F.3d at 411-413, App. 40-45.

A public employee who wishes to engage in prayer and proselytizing while on duty at work creates an undue hardship for his or her public employer, and any accommodation of that behavior would impose:

> "a priority of the religious over the secular" and thereby raise significant questions as to the constitutional validity of the statute [Title VII] under the Establishment Clause of the First Amendment.

Hardison, at 97 S.Ct. 2269, n. 4, citing *Hardison v. TWA*, 375 F.Supp. 877, 883 (W.D. Mo. 1974), quoting Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich. L.Rev. 599, 628 (1971). Title VII requires many things of employers, but it does not require employers to allocate privileges "according to religious beliefs," *Id.*, nor does it require employers "to discriminate against some employees in order to enable others to observe their Sabbath." *Id.*

Even if Brown's conduct was protected, this case nevertheless should be remanded to the District Court for ultimate determination of the discrimination issue. Only two of the five parts of the June 1990 reprimand were held by the Court of Appeals to be in violation of Title VII, while the remainder of the reprimand was deemed lawful. Likewise, each and every one of the six other reasons for Brown's termination were found to be lawful. The case should be returned to the district court for a determination as to whether the County can prove " . . . by a preponderance of the evidence that it would have reached the same decision as to respondents' reemployment even in the absence of the protected conduct." *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S.

274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). At the very least the Court of Appeals decided contrary to *Mt. Healthy* when it refused to return the case to the trial court. *Brown*, 61 F.3d at 657, App. 59-60.

The County respectfully requests this Court to accept certiorari to settle the conflict created by the Eighth Circuit and to relieve employers throughout the Circuit of the burdens of being required to pay employees for work time spent praying and proselytizing.

B. Paying a government employee to pray and proselytize while on duty at work is an Establishment Clause violation, and an Establishment Clause violation is an undue hardship for Title VII purposes that a government employer need not bear.

Although this is a Title VII case, Polk County has maintained throughout that paying Brown and others in his department with public funds to pray and proselytize while on duty at work is an Establishment Clause violation, and that requiring a government employer to violate the Establishment Clause is an undue hardship under Title VII. The June 1990 reprimand expressed that sentiment quite clearly. The Eighth Circuit, however, completely ignored that argument.[8] In doing so it rendered a decision which directly conflicts with a line of Establishment Clause cases decided by this Court. *See*: *Rosenberger*

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[8] The Eighth Circuit only addressed Establishment Clause concerns as they related to Brown's constitutional claims which were not connected with his termination. The County does not challenge that part of the Court's ruling.

v. Rector and Visitors of the University of Virginia, ___ U.S. ___, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Capitol Square Review and Advisory Board v. Pinette*, ___ U.S. ___, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, ___ U.S. ___, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

The "central lesson" of this Court's most recent Establishment Clause decision is that governments must maintain neutrality toward religion. *Rosenberger*, 115 S.Ct. at 2521. If Polk County pays (or is forced to pay) its employees to pray and proselytize while on duty at work the line between church and state, which can be defined as a line of neutrality, becomes so faint as to be indiscernible. Neither the church nor the state in that instance would be independent of the other. Likewise, if the County is forced to pay Brown and others who engage in on-the-job religious activities, all pretense of neutrality is lost. The purpose of such payments is so impermissible that any claim of neutrality would be a sham. Finally, the *overt directness* of any payment from a public employer straight to a public employee for time spent praying and proselytizing raises the unavoidable perception that the government is endorsing the religious messages being espoused by its employees. This perception is only heightened when one of the employees being directly paid to pray and proselytize is the head of a large county department. A direct payment to such an employee under such circumstances is nothing less than an open message from the County, saying, in effect, "we endorse and embrace the religious teachings which Mr. Brown has

endorsed and embraced and approve their presence in the public work place at all times."[9]

This is not a situation "akin to a public servant contributing her government paycheck to the church." *Id.* at 115 S.Ct. 2556, citing *Witters v. Washington Dept. of Services For The Blind*, 474 U.S. 481, 487, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986). This is a situation where the government pays the funds directly to the person engaging in the religious activities, for the sole purpose of compensating the person for engaging in the religious activity. Thus the payment was not distributed in a manner to ensure its use for permissible purposes. Paying a public employee with public funds to pray and proselytize while on the public clock violates the Establishment Clause. The Eighth Circuit erred when it held otherwise, and this Court should grant certiorari to correct the error.

Having established that paying Brown with public money to pray and preach is an Establishment Clause violation, there remains only for this Court to formally declare that an Establishment Clause violation (or even a

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[9] This is not a case where a legislature hires a chaplain whose job is to commence legislative sessions with a prayer, an action which has historical support extending back to the days of the founding of the Republic and which has become a part of the "fabric of society". *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 3336, 77 L.Ed.2d 1019 (1983). Brown was not hired as a chaplain, and the meetings at which he and his employees routinely prayed were neither legislative sessions nor even open to the public. Likewise, praying and proselytizing were not tasks within Brown's job description. (Trial Exs. 21 and L). Also, the Eighth Circuit recognized that Brown's office was not a public forum. App. 55.

potential Establishment Clause violation) is an undue hardship for Title VII purposes. *Spratt v. County of Kent*, 621 F.Supp. 594, 601, (W.D. Mich. 1985); *aff'd*, 810 F.2d 203 (6th Cir. 1986); *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 766 (1987). *Spratt* is a decision which featured prominently in the reasoning of the District Court and the Eighth Circuit panel. *Brown* at 832 F.Supp. at 1315, App. 21, 24, *Brown*, 37 F.3d at 409, App. 36-37. It is conspicuous by its absence from the majority, en banc decision because its facts so closely resemble the facts of this case. The Eighth Circuit decision directly conflicts with the *Spratt* decision.

No question exits but that a government's interest in complying with Establishment Clause obligations is a compelling interest. *Rosenberger*, 115 S.Ct. at 2547; *Capitol Square*, 115 S.Ct. at 2446; *Lamb's Chapel*, 113 S.Ct. at 2148; (Souter, J. dissenting).

Likewise, protecting a compelling state interest is at least as important as avoiding an undue governmental hardship. *Brown*, 61 F.3d at 654, App. 50, citing *U.S. v. Board of Education*, 911 F.2d 882, 890 (3rd Cir. 1990).

Because accommodation of Brown's religious activities would cause the County to potentially, if not actually, violate the Establishment Clause, it also would cause the County an undue hardship as well. The Eighth Circuit erred when it held otherwise, and the County respectfully requests this Court to accept certiorari in order to correct this error and settle the conflict the error has created.

C. To promote uniformity in the enforcement of federal law this Court should adopt a modified *Pickering*-type analysis for free exercise of religion claims in the public workplace and declare that an undue hardship for Title VII purposes exists when the balance tips in favor of the effective and efficient delivery of public services by a public employer.

This Court has recognized that various First Amendment rights of government employees may be limited by the vital need of the government to effectively and efficiently deliver public services. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (free speech); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (free speech); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (political affiliation); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (political affiliation).

This case provides the perfect vehicle with which to extend the *Pickering* balancing test to free exercise of religion claims by government employees. Both the District Court and the Eighth Circuit Panel in this case believed that such a test was appropriate. *Brown*, 832 F.Supp. at 1315, App. 21-25, *Brown*, 37 F.3d at 408, 409, App. 33-38. Even the en banc majority recognized the logical attraction of such a test, but failed to apply it to the Title VII claims in this case. *Brown*, 61 F.3d at 658-659, App. 61-62. There are several reasons for applying the government employee/free speech balancing test to government employee/free exercise of religion situations.

First, free speech rights are said to occupy the "highest rung" of the First Amendment ladder. *Connick*, at 461

U.S. 145, 103 S.Ct. 1689 (citations omitted). If those rights are to be subjected to a balancing test in the government work place, then free exercise rights which presumably occupy a lower rung, should be balanced in the same manner.

Second, the test makes the transition from speech to religion easily and naturally because the conduct at issue is often so similar. The individual elements which comprise the free speech balancing test can be transferred almost part and parcel to a free exercise balancing test. The free speech elements as identified in *Connick*, 461 U.S. at 151-53, 103 S.Ct. at 1692-93 are:

1. The degree to which the exercise of the right impedes the employee's duties or the employer's duties.
2. The manner, time and place of the exercise of the right.
3. The context in which the dispute arose.
4. The degree of public interest in the speech.

The free exercise elements which should be weighed in a like manner are the same, save element four, which should be converted to "the degree of infringement upon the free exercise rights of the employee".[10]

Third, since the impaired efficiency of but a single employee can be an undue hardship, *Hardison*, at 432 U.S.

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[10] It is also worth noting that if the actions of the public employee at issue constitute a violation of the employer's policies, the position of the employer is strengthened. *Connick*, 461 U.S. at 153, 103 S.Ct. at 1693, citing *Mt. Healthy*, 429 U.S. at 284, 97 S.Ct. at 574.

85, 97 S.Ct. 2277, then certainly the impaired efficiency of the employer's overall operation would qualify as an undue hardship as well. If even a small percentage of County employees engaged in group prayer and religious proselytizing at work the effect upon the efficient and effective delivery of public services would be enormous in terms of hours lost and fiscal cost.

Finally, a necessary interplay exists between Title VII and the Free Exercise Clause. The Eighth Circuit recognized as much when it said:

> With specific reference to the free exercise clause, we hold that in the governmental employment context, the first amendment protects at least as much religious activity as Title VII does. *See, e.g., United States v. Board of Education*, 911 F.2d 882, 890 (3d Cir. 1990) ("at the very least, undue hardship is a lower standard than compelling state interest"). Another way of framing that holding is to say that any religious activities of employees that can be accommodated without undue hardship to the governmental employer, *see* 42 U.S.C. §2000e(j), are also protected by the first amendment. In other words, if a governmental employer has violated Title VII, it has also violated the guarantees of the first amendment. *Brown*, 61 F.3d at 654, App. 50-51.

Since Title VII and the Free Exercise Clause are synonymous or nearly so in the governmental employment context, then a single standard ought apply to them both. The standard which most readily applies is a modified *Pickering*-type balancing test.

Under such a test, the error of the Eighth Circuit becomes immediately clear. Brown's limited free exercise rights (his religion only commanded him to pray; he never said it commanded him to pray while on duty at work) must give way because of the undue hardship the exercise of those rights would visit upon his employer.[11] Brown's freedom of religious belief is absolute, but his freedom of religious conduct is not. *Bowen v. Roy*, 476 U.S. 693, 699, 106 S.Ct. 2147, 2151-52, 90 L.Ed.2d 735 (1986).

Because Title VII and the First Amendment protect the same rights of government employees, those rights must be balanced upon the same scale. The defendants respectfully request this Court to accept certiorari, adopt and apply such a uniform standard, and reverse the decision of the Court of Appeals for the Eighth Circuit.

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[11] The reasoning of the Eighth Circuit was that no undue hardship was suffered by the County because "no actual imposition upon co-workers or disruption of the work routine" occurred. 61 F.3d at 657, App. 58 (citation omitted). That reasoning is patently false. Any religious activity which occurs while the employee is on duty at work must, by definition, disrupt the work routine. Even if the reasoning were true, however, it has no place under a modified *Pickering*-type test. This is so because it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152, 103 S.Ct. at 1692 (citations from footnote omitted).

CONCLUSION

For all of the reasons indicated above, petitioners respectfully request the Court grant their petition for writ of certiorari and reverse the en banc decision of the Eighth Circuit and reinstate the panel decision of the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3313

Isaiah Brown, Appellant, vs. Polk County, Iowa, A Municipal Corporation; Ray Sears, Former County Administrator for Polk County; and Polk County Board of Supervisors, Appellees.	*	Order Denying Suggestion for Rehearing *En Banc.*

Filed: September 21, 1995

Before RICHARD S. ARNOLD, Chief Judge, and McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

The petition for rehearing *en banc* asserts that "Polk County was never allowed to present evidence concerning whether it would have terminated Mr. Brown's employment without considering the two incidents this court invalidated." To the contrary, the district court held

a five-day bench trial at which Polk County had every opportunity to ask whatever questions it wanted and to develop the record in any way it desired. Now, more than two years after the original trial, Polk County seeks in effect to reopen the evidence in order to repair an omission on its part. We see no reason to grant that request.

The petition for rehearing *en banc* is therefore denied.

FAGG, Circuit Judge, dissenting, joined by LOKEN, HANSEN, and MURPHY, Circuit Judges.

I dissent from the order denying rehearing *en banc*.

I would grant Polk County's suggestion for rehearing *en banc*. First, Brown's Title VII claim should be remanded to the district court for development of the record and factual findings under the *Price Waterhouse* mixed-motives test, which the district court did not apply at trial. The County should be given an opportunity to present evidence about whether it would have fired Brown absent consideration of the group prayers and Brown's religious statements during departmental meetings. Second, Brown failed to prove the County's actions substantially burdened his religious practices, an essential element of his free exercise claim. Last, the court's opinion raises more vexing questions than it answers about a supervisor's practice of religion on a public employer's time. Indeed, I believe the court misconstrues First Amendment law in stating the Establishment Clause and the Free Exercise Clause are separated by an "ample and well-defined space" and "cannot . . . make conflicting demands on a government." *Brown v. Polk County, Iowa*, 61 F.3d 650, 659 (8th Cir. 1995) (*en banc*).

A true copy.

Attest: Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

DISTRICT COURT OPINION

LONGSTAFF, District Judge.

Plaintiff, Isaiah Brown, brought this action against his former employer, Polk County and Ray Sears, alleging violations of Title VII and 42 U.S.C. Sec. 1983. A bench trial commenced on Monday, May 10, 1993. Plaintiff was represented by Robert A. Wright, Jr. and Defendants were represented by Assistant Polk County Attorney, Mark Godwin.

I. INTRODUCTION

This suit arises out of Plaintiff's termination as Director of the Information Services Department of Polk County. Plaintiff, Isaiah ("Ike") Brown maintains his discharge was the result of racial and religious discrimination. Plaintiff also asserts that Defendants violated his First Amendment rights of freedom of expression and freedom of religion.

On February 11, 1991, Plaintiff filed a complaint with the Iowa Civil Rights Commission and the Equal Employment Opportunity Commission alleging discrimination by his employer, Polk County. Plaintiff received a right-to-sue letter and brought this action alleging violations of 42 U.S.C. Sec. 1983, Title VII of the Civil Rights Act of 1964 and the Iowa Civil Rights Act.

II. FACTUAL FINDINGS

Plaintiff, Isaiah Brown, is a 39 year-old African-American male and self-professed born-again Christian. Plaintiff was hired by the Defendant, Polk County, in

1983 as Manager of Computer Operations for Polk County. He served in that capacity until 1986 when he was promoted to the position of Director of the Polk County Information Services Department ("ISD").[1] Plaintiff served as the Director of Information Services until he was terminated on December 3, 1990. In his capacity as Director of the ISD, Plaintiff was responsible for planning and organizing Polk County's data processing operations. Plaintiff gave technical data processing advice to department heads and elected officials. Plaintiff also supervised approximately 50 employees in the data processing department. As a technical specialist in data processing, Plaintiff made periodic suggestions for improvement in the County's data processing programs. If deemed appropriate by County Administrator Ray Sears or the appropriate review committee, Plaintiff's recommendations were presented to the Board of Supervisors for consideration.

As ISD Director, Plaintiff experienced difficulty with project scheduling. Many ISD projects were behind schedule, requiring the frequent revision of proposed project timetables. In 1988, an oversight board called the Systems Development Review Committee (SDRC) was created to monitor the ISD. The SDRC was composed of

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[1] Plaintiff was appointed to the position of Director of the ISD by Ray Sears, Polk County Administrator. Sears, as Polk County Administrator, was not an elected official, but served as a liaison to the Polk County Board of Supervisors. Sears served as a staff advisor to the Board of Supervisors on matters relating to County operations. His duties included developing, recommending and monitoring the effective implementation of Board policies.

Supervisor Clark Rasmussen, Comptroller Jim Koolhof, and Sears. Plaintiff was an ex-officio member of the Committee. The plans, projects and budget for Plaintiff's department were reviewed by the SDRC before submission to the Polk County Board of Supervisors.

As a department head, Plaintiff was evaluated on an annual basis by his immediate supervisor, Ray Sears. For the most part, Plaintiff's evaluations were satisfactory. Sears, however, expressed concern with Plaintiff's ability to communicate, delegate authority and maintain predetermined schedules in Plaintiff's 1988, 1989 and 1990 performance evaluations. Sears also cited problems with morale in the ISD.

In late 1989 the ISD continued to experience delays in meeting project deadlines. In an attempt to address the problem, the Board of Supervisors entered into a contract with an outside consulting firm to evaluate the ISD. The study concluded with a written report recommending various changes in the ISD, including a complete shift in the mission of the ISD from a "development" department to a "maintenance" department, the furlough of twenty-five (25) employees, the elimination of 11 positions, and the reclassification of several other positions. The restructuring process was to be completed by May 1, 1990.

Upon learning of the planned reorganization, ISD employees began to speculate as to which employees would be placed in jeopardy by the reorganization. Rumors were further fueled by low morale and a polarization within the ISD. The source of that polarization, at least in part, was a division in the department between a cohesive group of born-again Christian employees and

the other ISD employees. Plaintiff, as a born-again Christian, was close to those ISD employees who shared his faith. The group's affiliation began in 1985, with the formation of an early morning Bible study held before working hours in the Polk County Administration Building.[2] After the organized Bible study ceased, the group remained close and sometimes gathered to pray or discuss their personal problems. On at least one occasion, the group engaged in spontaneous prayer in Brown's office. As may have been expected, the closeness of the born-again Christian faction caused resentment among the other ISD employees. Consequently, when news of a reorganization reached employees in the ISD, there was concern that Brown would give rehiring preference to members of the born-again Christian group.

Concerned with rumors about reorganization, Brown issued a memorandum stating religious affiliation would play no role in reorganization decisions. Brown then called a department-wide meeting to emphasize that preference would not be given born-again Christians. On May 2, 1990 Brown met with the rehired employees to further facilitate departmental communication. At that meeting, Brown professed his Christianity but pointed out to the rehired employees that their religious beliefs did not enter into the decision making process. Brown also discussed with employees the importance of a work

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[2] The Bible study group was later told they could not use Polk County property for meetings unrelated to work. The group then moved the Bible study meetings to a room in the city library. Shortly thereafter, the group ceased meeting on a regular basis.

ethic. In so doing, he referenced a passage in the Bible which spoke against slothfulness.[3]

In the spring and early summer of 1990, complaints of inappropriate religious activities in the ISD were made to the Personnel Department and to the office of the County Administrator. Based upon these complaints, Ray Sears requested an investigation into religious activity in the ISD. Thomas Evans, Labor Relations Manager for Polk County, filed a report on July 16, 1990.[4] In addition to prayer meetings and religious counseling, the report indicated that Brown also had Bible study notes typed by his secretary and that Brown solicited funds from employees for a church project.[5] As a result of the report, Plaintiff was issued a written reprimand on July 20, 1990. The reprimand ordered Brown to end his role in all religious activities on County time and to see that

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[3] Plaintiff's statements were made in the following contexts: First, Plaintiff noted that he was a born-again Christian, but that neither his religion nor the religion of ISD employees would play any role in his supervision of the ISD. Second, Plaintiff, in encouraging employees to maintain a strong work ethic, stated that one of the most useful things he has gleaned from studying the Bible is the directive to work hard and not be slothful.

[4] Evans was assigned the investigative task by Diana Williams, Personnel Director for Polk County.

[5] Plaintiff's use of his secretary to type religious materials, however, had ceased prior to the investigation. Also, the report's allegation that Brown had solicited funds for church in the workplace, was not supported by the evidence at trial.

employees in the department did the same. The reprimand also ordered Brown to cease all religious proselytizing, witnessing or counseling at work.[6] Plaintiff did not receive the full raise that he expected in 1990 because of the reprimand.

Shortly after Plaintiff's reprimand, Ray Sears attended a departmental meeting in Brown's office. At that meeting, Sears noticed certain religious items on Plaintiff's desk and office walls. Sears instructed Plaintiff to remove all religious paraphernalia from his office. The items that Brown was instructed to remove included a wall plaque, a framed wall poster, a ceramic item with the Lord's prayer and a small folding stained glass plaque. Brown was also instructed to remove a small Bible which he kept in his desk. Brown complied with Mr. Sears' orders to remove these items.

In August of 1990 a series of newspaper articles appeared in the Des Moines Register detailing the incidents of religious activity within the ISD. The reports also indicated that several employees had filed charges with the EEOC alleging religious discrimination during the reorganization process. In any case, Plaintiff continued as supervisor of the ISD, and no new instances of religious activity were reported.

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[6] The reprimand read in part:

Mr. Brown will immediately cease any activities that could be considered to be religious proselytizing, witnessing, or counseling and will further cease to utilize County resources that in any way could be perceived as to be supporting a religious activity or religious organization.

On November 20, 1990, Ray Sears issued Ike Brown another written reprimand. The reprimand addressed two actions taken by Brown which reflected poorly on his judgment with regard to budgetary matters. First, Sears expressed concern over Brown's utilization of bargaining unit employees on an on-call basis. Although not contrary to their union contract, Sears was disturbed with the lack of budgetary funds for such a use of employees. Second, Sears also voiced concern with Brown's recommendations relating to changes in the data processing system in the County Treasurer's Office.[7] Specifically, Sears noted that there were more efficient and affordable alternatives to Brown's proposal.

In November of 1990, Ray Sears ordered Tom Evans to conduct another investigation of the ISD. This time, however, the investigation was prompted by reports that county computers were being used for personal business. Inappropriate use of County computers was a reoccurring problem in the ISD. Plaintiff previously sought to address the issue through a department-wide memorandum. Despite the memorandum, however, personal use of computers by ISD employees continued. Among the items found on ISD computers during the investigation were pornography, games, personal budgets and religious material.[8]

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[7] A modification in the County Treasurer's data processing system was necessitated by legislation altering real estate tax assessments and collections.

[8] The personal use of computers was of particular concern to the County because of (1) the reoccurring nature of the problem; (2) the potential for sexual harassment claims as a result of the pornographic material on the computers; and (3) the effect

Evans completed his investigation into the personal use of computers on Friday, November 30, 1990. When Evans left work on November 30, he had not yet completed a written report for Sears. Over the weekend, an excess of 10 inches of snow fell on the Des Moines area. On Monday morning, Tom Evans was snowbound and unable to get to work. Upon learning that Evans' investigation was complete, however, Ray Sears made arrangements for a Polk County employee to pick up Evans with a four wheel drive vehicle. Evans made it into the office and met with Sears in the early afternoon of December 3, 1990. On December 3, 1990, Plaintiff was terminated by Mr. Sears with Mr. Evans in attendance. Plaintiff was given the opportunity to resign but refused.

After Plaintiff's termination, Ray Sears assumed the role of interim director of the ISD. In March of 1991, the ISD underwent yet another major reorganization. The department ceased to exist as an independent department in Polk County, and was reorganized under the auspices of the General Services Department.

III. DISCUSSION OF LAW AND FACTS

A. TITLE VII and the Iowa Civil Rights Act

Section 703(a)(1) of the Civil Rights Act, 42 U.S.C. Sec. 2000e-2(a)(1) provides in part:

(a) It shall be an unlawful employment practice for an employer – (1) . . . to discharge any individual, or

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such widespread personal use of computers may have on productivity.

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race . . . religion. . . .

Likewise, Iowa Code Sec. 216 also makes it a violation of state law to discharge an employee because of his religion or race. Iowa Code Sec. 216.6 (1993).[9] Plaintiff contends Defendants violated both Title VII and the Iowa Civil Rights Act by discharging him because of his race and/or religion. For purposes of this opinion, the Court will assess concurrently Plaintiff's Title VII and state civil rights claims, as both claims require the same elements of proof. See e.g. Hall v. Gus Construction, 842 F.2d 1010 (8th Cir.1988); see also Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 477 (Iowa 1983).

1. Race Discrimination

There are two manners of proceeding in a Title VII race discrimination case. If a plaintiff demonstrates that an illegitimate criteria was a motivating factor in the employment decision, a "mixed motives" theory is appropriate. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); Radabaugh v. Zip Feed

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[9] Iowa Code Section 216.6 reads:

1. It shall be an unfair or discriminatory practice for any:

a. person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation . . .

Mills, Inc., 997 F.2d 444, 448 (8th Cir.1993); Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 201 (8th Cir.1993). Under the "mixed motives" theory, once a plaintiff establishes that race is a motivating factor, the defendant can escape liability only by proving that it would have made the same decision in the absence of discrimination. Id.

If, however, a Plaintiff cannot produce direct evidence of discrimination the three-stop analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) is appropriate. Under McDonnell Douglas, (1) the plaintiff must present a prima facie case; (2) the defendant must rebut the prima facie case by showing non-discriminatory reasons for termination; and (3) the plaintiff must show the reasons are pretextual and that intentional discrimination was the proven reason for the discharge. Id. at 802-04, 93 S.Ct. at 1824-25; St. Mary's Honor Center v. Hicks, ___ U.S. ___, ___, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993);[10] see alsoTexas Dept. of

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[10] As recognized by the Court in St. Mary's Honor Center v. Hicks, ___ U.S. ___, ___, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993), it is not enough that the fact finder concludes a defendant's reasons for discharge are pretextual. Instead, in order to prevail a plaintiff must also demonstrate that the employee's termination was the result of the employer's intentional discrimination. As the Court noted:

We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, that the employer has unlawfully discriminated. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe

Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

In the present case, there is no direct evidence of race discrimination. There is no evidence of actions or remarks of "the employer that reflect a discriminatory attitude." Gray v. University of Ark., 883 F.2d 1394, 1398 (8th Cir.1989). No evidence was presented to suggest a "discriminatory animus in the decisional process". Price Waterhouse v. Hopkins, 490 U.S. at 258, 109 S.Ct. at 1794; Cf.E.E.O.C. v. Alton Packaging Corp., 901 F.2d 920, 923-25 (11th Cir.1990) (statement made by person responsible for promotion decisions that "if it was his company, he wouldn't hire any black people" constituted direct evidence). Therefore, because there is no direct evidence of race discrimination, the three-part analysis of McDonnell Douglas is applicable.

Plaintiff has established a prima facie case. Defendant, therefore, must come forward with evidence of a nondiscriminatory reason for the adverse employment action. See Valdez v. Mercy Hosp., 961 F.2d 1401, 1403 (8th Cir.1992). Defendant presented evidence that Plaintiff was terminated because of his work-related performance. Although technically qualified, Brown did not adequately execute his supervisory and administrative functions.

McDonnell Douglas represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. ___ U.S. at ___, 113 S.Ct. at 2571.

Brown's deficiency in meeting deadlines, managing employees and communicating the technical aspects of data processing was documented by employment evaluations for 1988, 1989, and 1990.[11] Brown also failed to properly consider County budgetary concerns, as was required by his administrative post. Brown was issued a written reprimand for exceeding the County's budget when using employees on an on-call basis. Plaintiff was also criticized for spending an unnecessary amount of County funds to revise the County Treasurer's data processing system.

Ike Brown's difficulties in the department were evidenced by the need for a review committee to oversee the ISD's operations. No other County department required such a committee. Problems with the ISD were extensive enough to also require the hiring of an outside consulting firm by the County to diagnose and recommend solutions to the problems in the ISD.

Plaintiff's most significant downfall, however, was as a supervisor. During Plaintiff's reign as Director of the ISD, the ISD experienced morale problems. Those morale problems were due, at least in part, to the polarization of employees within the ISD. Plaintiff contributed to the polarization by engaging in inappropriate religious activities on county time. Plaintiff was unable to control and supervise employees in the department as evidenced by

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[11] Although Sears reported Plaintiff had difficulty communicating the technical aspects of data processing, it seems that a [sic] least a portion of the difficulty is attributable to Sears' lack of experience with data processing systems.

personal use of computers and the inability to meet project deadlines.[12] It was the combination of these various inadequacies which led the County to conclude that Defendant had "lost control of his department" resulting in his discharge.

The next step in assessing Plaintiff's claim is to determine whether Defendants' proffered reasons were pretextual. There was evidence that Defendants were eager to discharge Plaintiff and were waiting to secure a well-documented case for his termination.[13] There is no evidence, however, that the County's eagerness was attributed to racial animus rather than a frustration with Plaintiff's inability to supervise and administer the ISD. In sum, the evidence demonstrates that Plaintiff's discharge was not motivated by his race.

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[12] Plaintiff alleges that he did the most he could with regard to personal use of County computers when he issued the inter-office memorandum. While a supervising employee cannot be expected to control every move by its employees, the fact that Plaintiff's memorandum was ignored supports Defendants' position that he was unable to effectively supervise employees within the ISD.

[13] Particularly troublesome to the Court, is Mr. Sears' eagerness to discuss Mr. Evans' findings with regard to the personal computer usage. After learning that Evans had completed his investigation, Mr. Sears sent a County vehicle to fetch the snowbound Evans. Once Evans was able to make his report, Sears called Brown into his office and discharged him. The sequence of events on the day of Plaintiff's discharge illustrates Sears' over-eagerness to terminate the Plaintiff.

2. Religion

An employee cannot be discharged because of religion. 42 U.S.C. Sec. 2000e-2(a)(1). Religion is defined by Title VII as including:

> all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employers business.

42 U.S.C. 2000e(j).[14] The aim of Title VII's provision prohibiting religious discrimination is to ensure that individuals are hired and retained because of their job skills, not their religious background or practices.[15]

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[14] The most common type of claim under this provision is brought by an employee unable to comply with a job requirement because of a religious conviction. One example of such a case is when an employee is discharged for refusing to work on a sabbath. See e.g. Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir.1987); Turpen v. Missouri-Kansas-Texas R.R., 736 F.2d 1022, 1026 (5th Cir.1984).

[15] The intent of Title VII is well-described in a memorandum entered into the Congressional Record to support its original passage. The memorandum, quoted with approval by the United States Supreme Court, reads in part:

To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

Price Waterhouse v. Hopkins, 490 U.S. at 243, 109 S.Ct. at 1787 (quoting 110 Cong.Rec. 7247 (1964)).

Plaintiff maintains that Defendants violated Title VII by failing to accommodate his religious practices and then discharged him for participating in the protected activity. There is no direct evidence of an anti-religious animus on the part of Defendants requiring a mixed motive analysis.[16] Schleiniger v. Des Moines Water Works, 925 F.2d 1100, 1101 (8th Cir.1991) ("Simply because a discriminatory reason might be inferred from a prima facie case does not mean that a mixed motive case exists"). Accordingly, Plaintiff must establish a prima facie case and the Defendant must come forward with rebuttal evidence.

Under the facts of this case, Plaintiff may establish a prima facie case of religious discrimination by demonstrating that he engaged in religious activity of which Defendants were aware and that the religious practices

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[16] As discussed with regard to race discrimination under Title VII, in order to employ a mixed motives analysis a plaintiff must produce direct evidence of discriminatory animus. Direct evidence includes statements and conduct that undeniably reveal a discriminatory attitude. See Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir.1993). Conduct on the part of defendants that could be construed as having a legitimate nondiscriminatory purpose is generally not direct evidence. In the present case, there is no evidence that Defendants discharged Plaintiff because of a dislike for born-again Christians. Much like a race discrimination case under McDonnell Douglas, the Defendants in this case maintain they have legitimate reasons for discharging Plaintiff. Among those legitimate reasons is an interest in avoiding an unconstitutional entanglement with religion. Accordingly, Plaintiff has not presented evidence of a discriminatory attitude sufficient to employ a mixed motive analysis.

were a motivating factor in his discharge.[17] See Beasley v. Health Care Service Corp., 940 F.2d 1085, 1088 (7th Cir.1991); E.E.O.C. v. Universal Mfg. Corp., 914 F.2d 71, 78 (5th Cir.1990); Johnson v. Angelica Uniform Group, Inc., 762 F.2d 671, 673 (8th Cir.1985). The burden of establishing a prima facie case of religious discrimination is not an onerous one. The plaintiff need only show that he was discharged under circumstances which give rise to an

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[17] The Eighth Circuit stated in Johnson v. Angelica Uniform Group, Inc., 762 F.2d 671 (8th Cir.1985):

To establish a prima facie case of religious discrimination, a plaintiff must plead and prove that '(1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he has informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment requirement'.

Id. at 673, quoting Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir.1979).

Generally, a Plaintiff must demonstrate that the employer was informed of the employee's religious beliefs. Under the facts of the present case, however, it is enough that Polk County knew of Plaintiff's religious activity. Unlike the usual religious discrimination case, Plaintiff does not allege he was discharged for violating an employer's previously established religiously neutral policy. Instead, the policy was made known to Plaintiff in response to his already accomplished religious activity. Therefore, the requirement that a Plaintiff inform the employer of the religious activity is not essential to demonstrate an "inference of unlawful discrimination". Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1980). The elements of proof in employment discrimination cases were not meant to be "rigid, mechanized or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). See Shapolia v. Los Alamos Nat'l Laboratory, 992 F.2d 1033 (10th Cir.1993) (example of how prima facie case altered to meet the facts of the case).

inference of unlawful discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253-54, 101 S.Ct. at 1093-94. Plaintiff established a prima facie case by demonstrating he is a born-again Christian who was disciplined by his employer for religious on-the-job activity and that his discipline played a role in his termination.

Once a prima facie case is established, the burden shifts to the Defendants to produce evidence that no accommodation was possible without subjecting it to undue hardship. Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir.1992); United States v. Bd. of Educ. of School D., 911 F.2d 882, 886 (3d Cir.1990).[18] Although undue hardship is generally evaluated in terms of economic costs, an employer may also meet the undue hardship standard by establishing the accommodation would compromise the rights of others. For instance, in Cook v. Chrysler Corp., 981 F.2d 336 (8th Cir.1992), the Eighth Circuit Court of Appeals held that an employer did not have to accommodate an employee's need for time off for a religious observance when such an accommodation would violate

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[18] An employer's duty to reasonably accommodate an employee's religious beliefs was recognized in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). The employer's duty of accommodation was incorporated into Title VII through the definition of "religion" which reads:

The term religion includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. Sec. 2000e(j).

the terms of the collective bargaining agreement and *infringe on the rights of co-employees. Id. at 338-39.*

Likewise, in the present case Plaintiff seeks an accommodation with more than economic implications for the employer. Plaintiff asserts a need to pray and quote scripture during working hours. Such a need conflicts with the County's duty to maintain a religiously neutral working atmosphere. See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 579, 109 S.Ct. 3086, 3093, 106 L.Ed.2d 472 (1989); Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); Smith v. County of Albemarle, 895 F.2d 953, 960 (4th Cir.), cert. denied 498 U.S. 823, 111 S.Ct. 74, 112 L.Ed.2d 48 (1990). Allowing supervisors and employees to witness and pray on County time would work an undue hardship on the County's duty of religious neutrality. As a supervisor, Plaintiff's testimonials could be viewed by employees as religious endorsements attributable to County government. See e.g. United States v. Board of Education of School D of Philadelphia, 911 F.2d 882 (3d Cir.1990); Spratt v. County of Kent, 621 F.Supp. 594, 600-01 (W.D.Mich.1985), aff'd 810 F.2d 203 (6th Cir.1986), cert. denied 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 766 (1987). Moreover, religious activity may lend itself to the type of conduct prohibited by Iowa's own Civil Rights laws forbidding religious harassment and discrimination. See Vaughn v. Ag. Processing Inc., 459 N.W.2d 627 (Iowa 1990). Therefore, after careful consideration of the law in the area of religious practices and the prohibition on the establishment of religion, the Court concludes that Defendants could not have accommodated Plaintiff's religious needs without undue hardship.

Even if Defendants failed in their duty to accommodate Plaintiff's religious beliefs, however, Plaintiff has not established that he was discharged because of his religious activity. See Joyner v. Garrett, 751 F.Supp. 555, 564 (E.D.Va.1990). Indeed, the duty to make a reasonable accommodation does not mean that an employer has to accommodate the employee, rather than discharge the employee, when the employee's performance is otherwise inadequate. See Baz v. Walters, 599 F.Supp. 614 (C.D.Ill.1984) aff'd 782 F.2d 701 (7th Cir.1986). As previously discussed, Defendants extend numerous non-discriminatory reasons for Plaintiff's discharge. The evidence confirms it was inadequate performance which led to Plaintiff's termination. Accordingly, Plaintiff cannot recover under Title VII or the Iowa Civil Rights Act.

SECTION 1983: CONSTITUTIONAL RIGHTS

Plaintiff also claims a violation of 42 U.S.C. Sec. 1983 which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Plaintiff alleges a violation of his rights under the First Amendment to the Constitution and the Equal Protection Clause of the Fourteenth Amendment. Namely,

Plaintiff argues he was terminated for exercising his First Amendment rights.[19]

Public employees who are terminated for exercising their First Amendment rights may seek redress under 42 U.S.C. Sec. 1983. Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); Pickering v. Bd. of Education, 391 U.S. 563, 569, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811 (1968); see also Huang v. Bd. of Governors of University of North Carolina, 902 F.2d 1134 (4th Cir.1990). To prevail on such a claim, the Plaintiff must first establish his conduct was entitled to constitutional protection. Plaintiff must then demonstrate that the protected activity was a substantial or motivating factor in the decision to take action against the employee. The burden then shifts to the employer to present evidence that the employee would have been terminated even in the absence of the protected conduct. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 284-85, 97 S.Ct. 568, 574-75, 50 L.Ed.2d 471 (1977); Erickson v. Pierce County, 960 F.2d 801 (9th Cir.1992); Derrickson v. Bd. of Educ. of St. Louis, 703 F.2d 309 (8th Cir.1983).

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[19] The acts Plaintiff complains of may "fairly be said to represent official policy", of Polk County and are therefore appropriate for consideration under 42 U.S.C. Sec. 1983. Monell v. Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Jane Doe "A" v. Special Sch. Dist. of St. Louis, 901 F.2d 642 (8th Cir.1990).

In the present case, the first issue is whether Plaintiff's conduct was entitled to constitutional protection. Although the First Amendment's guarantee of the freedom of religious belief is absolute, the freedom to act on that belief is not. Bowen v. Roy, 476 U.S. 693, 698, 106 S.Ct. 2147, 2151, 90 L.Ed.2d 735 (1986). Likewise, not all forms of expression are protected speech. The issue in the present case, therefore, is whether Plaintiff's conduct is the type of activity the First Amendment was intended to protect. See Rankin v. McPherson, 483 U.S. 378, 383, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987).

As previously explored, Polk County has a duty to ensure that its employees, particularly their supervisors, remain neutral with regard to religious matters. See County of Allegheny v. American Civil Liberties Union, 492 U.S. at 579, 109 S.Ct. at 3093; Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); Roberts v. Madigan, 921 F.2d 1047 (10th Cir.1990); see also O'Malley v. Brierley, 477 F.2d 785, 793 (3d Cir.1973) (priests have no absolute right under First Amendment to enter a prison to conduct religious services and counseling). As one court noted:

Administrators of public institutions, such as schools and prisons, are required to balance the first amendment rights of their employees to freely exercise their religions against the first amendment's prohibition on the "establishment" of religion and against the free exercise rights of other individuals.

Spratt v. County of Kent, 621 F.Supp. at 600-01. When there is a danger that a supervisor's beliefs will impinge

on the beliefs of subordinates, state regulation of religious conduct is particularly justified.[20] Accordingly, neither the Free Exercise Clause nor the First Amendment's free expression guarantee protect Plaintiff's religious activity on County time or with County facilities.

The religious items kept in Plaintiff's office do not constitute the type of "expression" subject to First Amendment protections.[21] Moreover, Plaintiff has not established that the removal of religious items from his office inhibited his ability to freely exercise his religion. See Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir.) cert. denied 490 U.S. 1005, 109 S.Ct. 1638, 104 L.Ed.2d 154 (1989). Accordingly, Sears' directive to remove the items, although arguably overzealous,[22] does not rise to the level of a constitutional violation.

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[20] A limitation on religious activity does not contravene the Establishment Clause if (1) the enactment has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[21] Even if, however, Plaintiff was able to establish that such items constituted a First Amendment expression, the expression does not constitute a matter of public concern. Only expressions relating to matters of public concern are protected by the First Amendment in the employment context. See Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); Dorsett v. Bd. of Trustees for State Colleges & Universities, 940 F.2d 121 (5th Cir.1991).

[22] The Court would like to further address Mr. Sears' directive to remove all religious items from Brown's office. Although this Court has concluded that such a directive does not rise to the level of a constitutional violation, it is somewhat troubled by Mr. Sears' order. Brown complied with the County's orders to

3. Equal Protection

Plaintiff has likewise not carried his burden in establishing an equal protection violation. In order to succeed on an equal protection claim, a plaintiff must demonstrate that an illegitimate criteria created the basis for disparate treatment. See Agarwal v. Regents of the University of Minnesota, 788 F.2d 504 (8th Cir.1986). Likewise, equal protection is denied only where the adverse employment action is motivated by discriminatory animus. See e.g. FSK Drug Corp. v. Perales, 960 F.2d 6 (2d Cir.1992); Abdullah v. Gunter, 949 F.2d 1032 (8th Cir.) cert. denied ___ U.S. ___, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1991); Arroyo Vista Partners v. County of Santa Barbara, 732 F.Supp. 1046 (C.D.Cal.1990).

In the present case, Plaintiff did not establish that his termination was the result of religious or racial animus. Although other employees involved in religious activity and personal use of computers were not discharged,

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cease witnessing, counseling and proselytizing. Sears, however, felt it was necessary to also order Brown to remove all evidence of his faith from his personal work space. Sears' prohibition required Brown to expel from his office items of personal meaning, such as the stained glass plaque which belonged to his deceased brother. Generally, Brown's religious items were positioned for his viewing; not to inundate others with a religious message. The Bible was kept in a drawer for Brown's retrieval. Under these circumstances, the Court is not convinced that removal of all these items from Plaintiff's office was essential to prevent the County's excessive entanglement with religion. In this Court's view, a reasonable compromise could have been achieved.

those employees were not entrusted with the responsibility of administering an entire department. As Defendants demonstrated at trial, Plaintiff's discharge was prompted by a series of events which called into question Plaintiff's ability to govern the ISD. It was Plaintiff's failure as a supervisor, therefore, which prompted his termination. No other supervisor was involved in the various instances of inappropriate behavior and inadequate performance which served as the basis for Plaintiff's discharge. Furthermore, the County's policy with regard to religious witnessing, proselytizing and counseling applied to all County employees and not just the Plaintiff. Because Plaintiff did not prove that he was treated in a particular way because of his religion or race, his equal protection claim must also fail. See United States v. Sperry Corp., 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989); Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); McQueary v. Blodgett, 924 F.2d 829 (9th Cir.1991).

CONCLUSION

Plaintiff has failed to establish that his termination violated the mandates of Title VII or 42 U.S.C. Sec. 1983.

Accordingly, IT IS ORDERED that judgment shall be entered for the DEFENDANTS.

8TH CIRCUIT PANEL DECISION
BROWN V. POLK COUNTY

Before FAGG, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

FAGG, Circuit Judge.

Isaiah Brown is a black man who describes himself as a born-again Christian. After Polk County terminated his employment as director of the County's Information Services Department (ISD), Brown brought this action against Polk County, the Polk County Board of Supervisors, and his former supervisor, County Administrator Ray Sears (collectively Polk County). Brown alleged Polk County violated Title VII by terminating him because of his race and his religion. Brown also brought 42 U.S.C. § 1983 claims alleging Polk County violated his First Amendment rights of freedom of expression and freedom of religion. Following a bench trial, the district court held Brown failed to show Polk County violated Title VII or 42 U.S.C. § 1983. **Brown v. Polk County,** 832 F.Supp. 1305, 1316 (S.D.Iowa 1993). Brown appeals and we affirm.

The district court explained the facts of this case in detail, see id. at 1308-10, and we will only summarize them here. Brown was promoted to ISD director in 1986. In this capacity, Brown was responsible for planning and organizing Polk County's data processing operations and supervising about fifty data processing employees. Ray Sears, Brown's immediate supervisor, reviewed Brown's performance annually. Brown's evaluations were mixed and reflected Sears's concern about scheduling and departmental morale. Under Brown's command, the ISD was far behind schedule. The mismanagement was so

significant that Polk County hired an outside consultant to review the department. The consultant recommended a total departmental restructuring, which involved eliminating eleven positions and laying off twenty-five employees.

There was a rift in the ISD between the employees who were born-again Christians like Brown and the employees who were not. Beginning in 1985, Brown had held Bible study meetings with employees before work in the Polk County Administration building. The Bible study later stopped, but the group still met to pray or talk in Brown's office. Those who were not born-again Christians believed Brown would terminate them during the restructuring because they did not share his faith. After hearing this rumor, Brown held a departmental meeting and told the employees he would not consider an employee's religious views when making the termination decisions. After the restructuring, Brown met with the rehired employees in May 1990. Referring to his Bible study, Brown told the employees they should work hard as the Bible directed and not be slothful.

The County Personnel Department and County Administrator received complaints in summer 1990 about inappropriate religious activities in the ISD. At Sears's request, the County Labor Relations Manager investigated the complaints. The manager's report stated Brown held prayer meetings, performed religious counseling, and had his secretary type Bible study notes. Based on the report, Sears reprimanded Brown in writing in July 1990, ordering Brown to end his use of County resources to support a religious organization.

When Sears later visited Brown's office for a systems development review committee meeting, Sears saw some religious objects. According to Brown, Sears told him to "take away the things on your wall and on your desk that may be considered offensive to employees." Brown complied without protest. Brown testified that because he wanted to comply, he removed his Bible from a desk drawer and asked Sears about it. Sears said, "That goes, too." Because Sears told Brown to keep the entire ISD free of religious materials, another employee also removed personal religious items. Brown's management problems continued. In December 1990, the ISD was investigated again after sexually explicit material and personal games were discovered on employees' computers.

Noting Polk County's duty to ensure its administrators remain neutral about religious matters, the district court balanced Brown's First Amendment rights against the First Amendment's prohibition on the establishment of religion and the free exercise rights of Brown's co-employees. The district court concluded neither the free exercise nor free expression guarantees protected Brown's religious activity on County time or with County facilities. 832 F.Supp. at 1315-16. The district court further held the removed items did not constitute the type of symbolic expression protected by the First Amendment, and Brown failed to show the removal of religious items from his office inhibited his ability to exercise his religion freely. Id. at 1316.

In challenging the district court's decision that Polk County did not violate his First Amendment rights, Brown does not dispute the district court's factual findings, but attacks the district court's analysis and legal

conclusions. Citing Hall v. Ford, 856 F.2d 255, 262-63 (D.C.Cir.1988), a free speech case, Brown asserts he need only show his employment was conditioned on the compromise of a constitutional right. Brown seems to assert his free speech and free exercise rights are absolute. Later, Brown argues that to overcome his First Amendment rights, the government must show it had a compelling interest and it used the least restrictive means of achieving its compelling interest. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) (strict scrutiny standard). Thus, we must decide which legal standards apply to a public employee's free speech and free exercise claims.

The legal standard controlling Brown's free speech claim is clear. Although government employees do not relinquish their free speech rights as a condition of public employment, the First Amendment is not a license for interference with the proper functioning of the workplace. Connick v. Myers, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983); see Grantham v. Trickey, 21 F.3d 289, 292 (8th Cir.1994). The government's legitimate interest in regulating speech is greater for public employees than for general citizens. See Connick, 461 U.S. at 140, 103 S.Ct. at 1686. The government has a strong interest in avoiding the interference of employee speech with work, personnel relationships, and the employee's job performance. Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315 (1987). To decide what regulation of a public employee's speech is constitutionally permissible, a court balances on a case-

by-case basis the employee's interest as a citizen in commenting on matters of public concern and the government's interest as an employer in promoting efficient public services. Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968); Shands v. City of Kennett, 993 F.2d 1337, 1344-46 (8th Cir.1993), cert. denied, ___ U.S. ___, 114 S.Ct. 880, ___ L.Ed.2d ___ (1994). This balancing accommodates the public employer's dual role as a public service provider and a government entity operating under the First Amendment's constraints.

Brown's reliance on Hall for an absolute free speech right is misplaced. Brown selectively quotes general language stating the government cannot condition employment on the compromise of a constitutional right. Hall, 856 F.2d at 262. In the very next sentence, however, the court in Hall explained this principle is limited by the government's legitimate interest in efficient operations. Id. at 263. Brown's failure to acknowledge this legitimate limitation is the basic flaw pervading his First Amendment arguments.

Having identified the controlling standard, we turn to the merits of Brown's free speech claim. Brown asserts Polk County violated his right to free speech by directing him to refrain from prayer and stating his Christian beliefs. We think Brown reads Polk County's directive too broadly. The written reprimand directed Brown to stop using Polk County resources to support and promote a religious organization, and to ensure the work environment was free of religious proselytizing, witnessing, and counseling. This language does not encompass Brown's

private prayers, or Brown's activities off County time or property.

Brown asserts his speech is a matter of public concern, but we need not decide this preliminary issue. Because the district court balanced the interests of Brown and Polk County, the court presumed Brown's speech was a matter of public concern. See Connick, 461 U.S. at 149, 103 S.Ct. at 1691. After weighing the interests of Polk County and Brown, the district court concluded Polk County did not violate Brown's free speech rights. We agree. Under Brown's leadership, the ISD was having significant problems with inefficiency, employee morale, and general mismanagement, and these problems were related to Brown's religious speech. In this case, Polk County's interest in efficient operations outweighs Brown's interest in expressing his religious beliefs to his subordinates at work. Finally, even if the religious items removed from Brown's office were protected symbolic expression, the same balancing analysis applies and defeats Brown.

We now consider the legal standard applicable to Brown's free exercise claim. The Supreme Court has long recognized a distinction between the freedom of individual religious belief and the freedom of individual religious conduct. Bowen v. Roy, 476 U.S. 693, 699, 106 S.Ct. 2147, 2151-52, 90 L.Ed.2d 735 (1986). Under the Free Exercise Clause, an individual's freedom of belief is absolute, but an individual's freedom of conduct is not. Id. In other words, individuals do not have an absolute right to practice their chosen religion as they please. Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 564 (8th Cir.1988). Beyond this point, however, the law is less

clear. The Supreme Court has never identified a legal analysis governing whether an adverse employment action infringes a public employee's right to free exercise of religion. Although we apply a Pickering balancing analysis in the context of public employees and free speech, it is unclear what analysis applies in the context of public employees and free exercise of religion. Brown believes the district court should have used a general strict scrutiny analysis.

The right to free exercise of religion is a fundamental constitutional right. Johnson v. Robison, 415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 1169 n. 14, 39 L.Ed.2d 389 (1974). As a general rule, a governmental action or regulation that burdens fundamental constitutional rights is strictly scrutinized. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666, 110 S.Ct. 1391, 1400-01, 108 L.Ed.2d 652 (1990). To pass constitutional muster, the action or regulation must be narrowly tailored to serve a compelling governmental interest. Id. Courts of Appeals have applied the general strict scrutiny test to public employees' claims that their public employers' actions have infringed their fundamental constitutional rights to expressive association and intimate association. See McCabe v. Sharrett, 12 F.3d 1558, 1566 (11th Cir.1994) (discussing cases). Despite the general rule, however, the Supreme Court does not strictly scrutinize public employers' restrictions on certain fundamental constitutional rights of public employees. As we have already explained, the Supreme Court uses a special analysis when examining restrictions on public employee expression. See supra at 407-408. The Supreme Court has also devised a special analysis for reviewing adverse public

employment decisions made for political patronage reasons. See Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

We have applied the strict scrutiny analysis to free exercise challenges to governmental action outside the public employment context. E.g., Murphy v. State of Arkansas, 852 F.2d 1039, 1041 (8th Cir.1988) (reviewing free exercise challenge to Arkansas Home School Act). In the absence of any challenge to the strict scrutiny standard, we once applied the standard to decide whether public employees should receive an exemption from a drug-testing program on religious grounds. Rushton, 844 F.2d at 563-64. On the other hand, we have recognized that regulations limiting fundamental rights are reviewed more deferentially when applied to public employees than when applied to ordinary citizens. Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1408 (8th Cir.1990).

In the context of state employees claiming infringement of their right to free exercise of religion, courts have applied a modified Pickering analysis to account for the state's duty under the Establishment Clause to ensure its employees do not encourage or promote one religion over other religions or any religion over nonreligion. See County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593-94, 109 S.Ct. 3086, 3100-02, 106 L.Ed.2d 472 (1989) (explaining state's duty). These courts balance the public employee's free exercise rights against the state's duties to avoid Establishment Clause violations and to protect the religious beliefs of other public employees. See, e.g., Langlotz v. Picciano, 683 F.Supp. 1041, 1048 (E.D.Va.1988), aff'd, 905 F.2d 1530 (4th

Cir.1990) (unpublished opinion); Spratt v. County of Kent, 621 F.Supp. 594, 600-01 (W.D.Mich.1985), aff'd, 810 F.2d 203 (6th Cir.1986) (unpublished opinion), cert. denied, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 766 (1987). This is the test that the district court applied in Brown's case. See 832 F.Supp. at 1315-16.

In our view, the modified Pickering analysis is more appropriate than a general strict scrutiny analysis in this case. To the extent that the Pickering analysis is viewed as more deferential to the public employer than a general strict scrutiny analysis, we see no reason to defer when fundamental speech or political affiliation rights are involved but not when free exercise rights are at stake. See McCabe, 12 F.3d at 1567. Pickering's rationale – that the government as an employer has a special interest in regulating its employees' behavior to avoid the disruption of public functions – applies to free exercise rights as well as free speech rights. See id. at 1568. Courts have applied a Pickering analysis outside the speech context in cases involving expressive association rights, liberty rights, and free exercise rights. See id. at 1568-69 (discussing cases); Langlotz, 683 F.Supp. at 1048. Application of the modified Pickering analysis in this case takes into account the disruptive potential of Brown's open free exercise conduct in the workplace, see McCabe, 12 F.3d at 1567, and best considers the tension Polk County faced between not establishing or promoting religion and not inhibiting its practice. We thus conclude the district court applied the proper legal analysis to Brown's free exercise claim.

Brown contends Polk County violated the Free Exercise Clause by restricting his right to believe and profess.

Again, Brown misreads Polk County's directive. In reprimanding Brown, Polk County sought to limit only Brown's conduct, not his belief. The district court weighed the competing interests of Brown and Polk County and concluded Polk County did not violate Brown's free exercise right by restricting his religious conduct on County time and property. 832 F.Supp. at 1315-16. Given Polk County's duties to avoid an Establishment Clause violation and protect the free exercise rights of employees other than Brown, Brown's status as a supervisor of fifty employees, and the adverse effects of Brown's religious conduct in the workplace, we agree with the district court that the balance of interests tips in Polk County's favor under the circumstances presented in this case.

Even if a strict scrutiny analysis applies as Brown contends, Polk County had an overriding compelling interest in restricting religious practices in the workplace: avoidance of an Establishment Clause violation. Goodall by Goodall v. Stafford County Sch. Bd., 930 F.2d 363, 370 (4th Cir.1991). Because Brown administered many employees as the ISD's director, Polk County needed him to be neutral towards religion in the workplace to maintain the County's neutrality. See Spratt, 621 F.Supp. at 600-01. We reject Brown's assertion that Polk County did not use the least restrictive means of accomplishing this legitimate goal. Brown's assertion is largely based on his mischaracterization of Polk County's policy.

Brown also contends Polk County violated the Free Exercise Clause by asking him to remove the religious items from his office. The removal of the religious items from Brown's office does not implicate the Free Exercise

Clause, however. To show a free exercise violation, a religious adherent must initially prove the challenged governmental action substantially burdens the adherent's religious practice. Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148-49, 104 L.Ed.2d 766 (1989); see Murphy, 852 F.2d at 1041 (governmental action must interfere with sincerely held religious beliefs). The burden must be more than an inconvenience; the burden must rise to the level of pressuring the adherent to commit an act the religion forbids, or preventing the adherent from engaging in conduct that the faith requires. Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir.1987), aff'd sub nom. Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148-49, 104 L.Ed.2d 766 (1989). Here, the district court found Brown did not prove the removal of the religious items from his office inhibited his ability to exercise his religion freely. 832 F.Supp. at 1316. This key finding is not clearly erroneous. Indeed, Brown did not protest Sears's instruction or otherwise indicate his born-again Christianity required him to keep a Bible in his desk and the objects on his desk and walls. Although the instruction to remove Brown's Bible in particular may have been overzealous and offensive, the district court's supported finding simply ends the free exercise inquiry. Having failed to show the removal substantially burdened his religious practice, Brown did not establish the threshold requirement for a free exercise violation.

As for his equal protection claim, Brown attacks the district court's finding that he was not subjected to disparate treatment in exercising his religious beliefs. See id. This attack is meritless. The County's policy applied to all County employees, not just Brown. We thus conclude the

district court properly rejected Brown's 42 U.S.C. § 1983 claims.

We now turn to Brown's Title VII arguments. Finding no direct evidence of racial or antireligious animus, 832 F.Supp. at 1311, 1313 & n. 16, the district court applied the three-step analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to Brown's racial and religious discrimination claims. Brown contends the district court should have applied the mixed motives test of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), because there was direct evidence of antireligious and racial animus on Polk County's part. In Brown's view, the written reprimand and Sears's instruction to remove the objects from Brown's office show improper motive. Brown's contention fails for two reasons.

First, Brown misunderstands his evidentiary burden. The Price Waterhouse test applies only if the plaintiff produces "evidence that directly reflects the use of an illegitimate criterion in the challenged decision." Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 202 (8th Cir.1993) (per curiam); see id. at 201 n. 1 (the term "direct evidence" means only that the plaintiff must present evidence showing a specific link between discriminatory animus and the challenged decision); Parton v. GTE North, Inc., 971 F.2d 150, 153 (8th Cir.1992) (plaintiff must show employer "actually relied" on improper ground in making adverse employment decision). We agree with the district court that Brown did not produce evidence that directly shows Polk County based Brown's termination on his religion or his race.

Second, because this case was tried on the merits, we need not concern ourself with whether the McDonnell Douglas or Price Waterhouse test applies. Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1060 (8th Cir.1993). Instead, we need only review the ultimate factual issue of whether Polk County intentionally discriminated against Brown on the basis of his race or religion. See id.; Finley v. Empiregas, Inc., 975 F.2d 467, 473 (8th Cir.1992). After the bench trial, the district court found Brown's inadequate performance was the reason for his termination. 832 F.Supp. at 1312, 1314. We conclude the district court's ultimate finding that Polk County did not discriminate against Brown based on his race or religion is not clearly erroneous. See Tuttle v. Henry J. Kaiser Co., 921 F.2d 183, 186 (8th Cir.1990) (standard of review). Having reviewed the ultimate issue, we need not consider Brown's attack on the district court's finding that Polk County could not have accommodated Brown's religious activities and expression without undue hardship. See 832 F.Supp. at 1314.

We have considered all of Brown's arguments and rejected them. Accordingly, we affirm the district court.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting in part.

The court holds today that Polk County, Iowa, may lawfully order one of its employees to remove from his office all items that manifest his religious faith and, even more incredibly, may direct him to remove his Bible from his desk drawer. The district court charitably characterized this heavy-handedness as "arguably overzealous," and confessed to being "somewhat troubled" by

it. **Brown v. Polk County**, Iowa, 832 F.Supp. 1305, 1316, 1316 n. 22 (S.D.Iowa 1993). It nevertheless decided that the county's action was not unconstitutional. The court also holds today that Polk County may lawfully order one of its employees to "cease any activity that could be considered to be religious proselytizing, witnessing, or counseling" in the workplace. I cannot subscribe to these conclusions, nor to this court's failure to give proper scope and dimension to Mr. Brown's rights of religious expression.

I.

I believe that it is well established that the right to the free exercise of religion is a fundamental right. See, e.g., Johnson v. Robison, 415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 1169 n. 14, 39 L.Ed.2d 389 (1974). That being the case, a government must demonstrate a compelling state interest before it can inhibit that exercise. While compelling interests, like beauty, may well lie mainly in the eye of the beholder, one is hard pressed to find such an interest here. The court's identification of the county's interest in avoiding a violation of the Establishment Clause violation as sufficiently compelling impermissibly shifts the fulcrum of neutrality much too far in one direction. It simply is not an establishment of religion to allow individuals to display items of religious significance in their offices, partly because this is not an action on the part of the county (see Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)); and there is not even a colorable argument that a Bible in a desk (even a desk owned by the government) breaches the wall of separation that must be maintained between government and

religion. Besides, if it were an establishment of religion merely to allow these kinds of activities, the county would have a complete answer to this lawsuit: It could say that it was legally compelled to issue the relevant directive, thus rendering it unnecessary to divine some so-called "interest" that the county had at stake.

One might, in the abstract (and in an appropriate case), sympathize with the defendants in the sense that it is not always easy to steer a correct course between the Scylla and Charybdis of the Religion Clauses. But the county has not claimed qualified immunity, perhaps because of its blind inability to see any Free Exercise interests whatever at stake here, a position completely consonant with its unfeeling disregard of Mr. Brown's rights and of its own duties under the Constitution. Nor do I think that the county could have succeeded if it had claimed qualified immunity. Polk County seems to have been bent on giving government sanction to the attitude that religion is simply out of place at the office. Citizens are certainly free to believe this and, of course, absent statutory regulation to the contrary, to give effect to that principle in their voluntary associations. What they are not free to do is to enlist the aid of government in imposing such restrictions on fellow workers. The conduct of the defendants here seems to me so egregious and obviously illegal as almost to furnish direct evidence of an anti-Christian animus on their part. Mr. Brown, moreover, has asked for a declaratory judgment that the relevant order was unconstitutional, a claim that is, of course, not subject to being defeated by qualified immunity. See, e.g., Wood v. Strickland, 420 U.S. 308, 314-15 n. 6, 95 S.Ct. 992, 996-97 n. 6, 43 L.Ed.2d 214 (1975); Malik v. Brown, 16

F.3d 330, 335 n. 4 (9th Cir.1994); and Mumford v. Zieba, 4 F.3d 429, 435 (6th Cir.1993).

II.

One may concede for the sake of argument that Polk County has a legal right or duty to ensure that its workplace is free from harassing behavior of a religious nature. But any interference with religious activity that the discharge of that duty entails must be reasonably related to that discharge and must be narrowly tailored to its achievement. Thomas v. Review Board of Indiana Employment Sec., 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981). Here, there was not the least attempt to confine the prohibition to harassing or intimidating speech, or narrowly to define the prohibited activity. Instead, Polk County baldly directed Mr. Brown to "cease any activity that could be considered to be religious proselytizing, witnessing, or counseling" (emphasis supplied). This order, which the court avoids quoting directly, exhibits a hostility to religion by government that our Constitution quite clearly prohibits. It would seem to require no argument that to forbid speech "that could be considered" religious is not narrowly tailored to the aim of prohibiting harassment. If Mr. Brown asked someone to attend his church, for instance, one supposes that that "could be considered" proselytizing; but its prohibition runs afoul of the Free Exercise Clause. Likewise, a statement to the effect that one's religion was important in one's life "could be considered" witnessing; yet for government to forbid it would be unconstitutional.

The court does not directly address these arguments, but seems to indicate that the desire to avoid establishing religion provides a sufficient excuse for a complete prohibition of any activity that "could be considered religious." As I indicated above, that holding strikes the balance between the Religion Clauses in a way that trenches unconstitutionally on ground occupied by the Free Exercise Clause. Our court recently had occasion to explore the boundary between the two clauses in Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501 (8th Cir.1994), in which the court held that allowing a religious organization the use of school premises did not amount to an establishment of religion. Id. at 1510. The court concluded that merely permitting someone to express a religious view was not an establishment of religion, noting that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids; and private speech endorsing religion, which the Free Speech and Free Enterprise Clauses protect." Id. at 1509 (quoting Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226, 251, 110 S.Ct. 2356, 2372-73, 110 L.Ed.2d 191 (1991)) (plurality opinion by O'Connor, J.). More succinctly, as Justice O'Connor indicated, id. at 250, 110 S.Ct. at 2371-72, "[t]he proposition that [governments] do not endorse everything they fail to censor is not complicated." Mr. Brown is speaking here, not Polk County.

III.

What is most unsettling to me about this case is the antiseptic approach that the court takes to its resolution.

It proceeds as though a routine application of an apolitical arithmetic could yield a scientifically ineluctable solution to the dispute that this case presents. Given the modes of constitutional analysis by which the court quite rightly deems itself bound, the court had necessarily to engage in some sort of balancing act to decide the case. So much is clear. (It is, moreover, difficult to think of rights outside a world governed by utility: A right's usefulness, at least in the abstract welfare economics sense, may well influence the scope that we give to it and the amount of nuisance that we will feel compelled to tolerate from its exercise.) But the tradition that produced our Bill of Rights was one that took rights seriously, and a healthy suspicion of government and a robust respect for individual autonomy were the values that gave that tradition shape and texture. It is this realization, and a willingness to act on it, that seems to me to be missing from the court's opinion. After being subjected to "balancing" and "weighing," the identification of "interests," and the application of "tests," Mr. Brown's rights are simply lost in the shuffle, impaled on some "prong," and reduced to the level of merely expendable desiderata. They ought instead to be given their proper weight as critical expressions of the constitutional boundary between the state and the individual.

I would reverse so much of the district court's judgment as rejected Mr. Brown's Free Exercise claims and affirm the other parts of the court's judgment from which he appeals.

8TH CIRCUIT EN BANC DECISION
BROWN V. POLK COUNTY

Before RICHARD S. ARNOLD, Chief Judge, and McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In mid-1986, Isaiah Brown, a black man who identifies himself as a born-again Christian, became the director of the information services (data processing) department for Polk County, Iowa. He reported directly to the county administrator and supervised approximately 50 employees.

In mid-1990, an internal investigation into religious activities conducted on government time by employees in Mr. Brown's department revealed that Mr. Brown had directed a secretary to type Bible study notes for him, that several employees had said prayers in Mr. Brown's office before the beginning of some workdays, that several employees had said prayers in Mr. Brown's office in department meetings held during the day, and that in addressing one meeting of employees, Mr. Brown had affirmed his Christianity and had referred to Bible passages related to slothfulness and "work ethics." Subsequently, the county administrator reprimanded Mr. Brown in writing for a "lack of judgment pertaining to his personal participation in and/or his knowledge of employees participating in activities that could be construed as the direct support of or the promotion of a religious organization or religious activities utilizing the resources of Polk County Government." The reprimand

directed Mr. Brown "immediately [to] cease any activities that could be considered to be religious proselytizing, witnessing, or counseling and . . . further [to] cease to utilize County resources that in any way could be perceived as to be supporting a religious activity or religious organization." The reprimand also directed Mr. Brown to "insure a work environment that is free of the types of activities . . . described." Subsequently, on a separate occasion, the county administrator directed Mr. Brown to remove from his office all items with a religious connotation, including a Bible in his desk.

In late 1990, the county administrator again reprimanded Mr. Brown in writing, on that occasion for a "lack of judgment" related to financial constraints in the county's budget. Two weeks later, after an internal investigation into personal use of county computers by employees in Mr. Brown's department, the county administrator asked Mr. Brown to resign; when he refused, the county administrator fired him.

In late 1991, Mr. Brown sued the county, its board of supervisors, and the county administrator. Mr. Brown alleged, under 42 U.S.C. s 1983, that the first reprimand and the order to remove from his office all items with a religious connotation violated constitutional guarantees of free exercise of religion, free speech, and equal protection. He also alleged, under 42 U.S.C. s 2000e-2(a)(1) (Title VII of the Civil Rights Act of 1964) and Iowa Code Ann. s 216.6(1)(a), that he was fired because of his race and his religion.

Because the requirements of the state statute in this case are the same as those of Title VII, our subsequent

discussion will refer to Title VII only, for the sake of simplicity. Our conclusions apply, however, to both the federal and the state claims. We note in addition that although some language in Mr. Brown's complaint suggests that his discharge violated the first and fourteenth amendments, he requested back pay and reinstatement to his job solely with respect to his statutory discrimination claims. The relief he sought for his constitutional claims, in contrast, was a declaratory judgment and compensatory damages. We note as well that Mr. Brown offered no actual argument to support the proposition that his discharge violated constitutional guarantees, as opposed to statutory prohibitions only, in his closing argument in the district court, his oral arguments in this court, or his appellate briefs.

After a five-day bench trial, the district court found for the defendants in all respects. See **Brown v. Polk County,** Iowa, 832 F.Supp. 1305 (S.D.Iowa 1993); see also **Brown v. Polk County,** Iowa, 811 F.Supp. 432 (S.D.Iowa 1992). On appeal, a divided panel of this court affirmed the judgment of the district court. See **Brown v. Polk County,** Iowa, 37 F.3d 404 (8th Cir.1994). On rehearing en banc, however, we affirm in part and reverse in part.

I.

[1] Federal and state laws forbid an employer to fire an employee because of that employee's race. See 42 U.S.C. s 2000e-2(a)(1) and Iowa Code Ann. s 216.6(1)(a). The district court made the factual finding that racial animus played no part in the decision to fire Mr. Brown.

See **Brown v. Polk County,** Iowa, 832 F.Supp. 1305, 1312 (S.D.Iowa 1993).

We have read the transcript of the entire trial and have examined all of the exhibits submitted at trial. We have also reviewed all of the materials in the district court file. The district court's conclusion that Mr. Brown's race played no part in his discharge is not clearly erroneous. See, e.g., Tuttle v. Henry J. Kaiser Co., 921 F.2d 183, 185-87 (8th Cir.1990). We therefore affirm the district court judgment with respect to the statutory race discrimination claims and turn to the statutory religious discrimination claims.

II.

Federal and state laws also forbid an employer to fire an employee because of that employee's religion. See 42 U.S.C. s 2000e-2(a)(1) and Iowa Code Ann. s 216.6(1)(a). "Religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." See 42 U.S.C. § 2000e(j); see also King v. Iowa Civil Rights Commission, 334 N.W.2d 598, 602, 602 n. 1, 604 (Iowa 1983).

The district court made the factual finding that religious animus played no part in the decision to fire Mr. Brown. See **Brown v. Polk County,** Iowa, 832 F.Supp. 1305, 1314 (S.D.Iowa 1993). The district court found, instead, that the reason for Mr. Brown's discharge was inadequate performance, see id., specifically, the inability

to supervise and administer his department, see id. at 1312. Because we find that religious activities played a part in the decision to fire Mr. Brown, and that the proof was inadequate to show that Mr. Brown would have been fired if those activities had not been considered, we reverse the district court judgment with respect to the statutory religious discrimination claims.

In most of the cases alleging religious discrimination under Title VII, the employer is a private entity rather than a government, and the first amendment to the Constitution is therefore not applicable to the employment relationship. See, e.g., Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 n. 5 (10th Cir.1989), cert. denied, 495 U.S. 948, 110 S.Ct. 2208, 109 L.Ed.2d 535 (1990). In cases such as this one, however, where a government is the employer, we must consider both the first amendment and Title VII in determining the legitimacy of the county administrator's action. The first amendment is, of course, applicable to state-created government units by virtue of the fourteenth amendment. See, e.g., Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081-82, 31 L.Ed.2d 263 (1972) (per curiam).

[2] With specific reference to the free exercise clause, we hold that in the governmental employment context, the first amendment protects at least as much religious activity as Title VII does. See, e.g., United States v. Board of Education, 911 F.2d 882, 890 (3d Cir.1990) ("at the very least, undue hardship is a lower standard than compelling state interest"). Another way of framing that holding is to say that any religious activities of employees that can be accommodated without undue hardship to the governmental employer, see 42 U.S.C. s 2000e(j), are also

protected by the first amendment. In other words, if a governmental employer has violated Title VII, it has also violated the guarantees of the first amendment. We turn, then, to a more detailed examination of the requirements of Title VII.

III.

The county administrator testified that he fired Mr. Brown "because of [a] culmination of incidents" that led him to conclude that Mr. Brown "had lost control of his department and was no longer in a position to manage effectively." The county administrator also testified, moreover, that the reprimand for "religious activities" was "a factor" in the decision to fire Mr. Brown. The labor relations manager for the county testified as well that, in asking for Mr. Brown's resignation and then firing him, the county administrator told Mr. Brown that the first reprimand was among the "concerns" prompting his discharge. Finally, Mr. Brown himself testified that the reasons given for his discharge by the county administrator were "the problems that [had] centered around [Mr. Brown's] department for [the] last two years, primarily religion." Unfortunately, none of the witnesses specified with any more particularity the exact actions to which the county administrator was alluding. We must, therefore, consider what activities were covered by the first reprimand and which, if any, of those activities were protected by Title VII.

[3] Preliminarily, we reject the defendants' argument that because Mr. Brown never explicitly asked for accommodation for his religious activities, he may not claim the

protections of Title VII. An employer need have "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir.1993). Because the first reprimand related directly to religious activities by Mr. Brown, we agree with the district court that the defendants were well aware of the potential for conflict between their expectations and Mr. Brown's religious activities. See **Brown v. Polk County,** Iowa, 832 F.Supp. 1305, 1313 n. 17 (S.D.Iowa 1993).

[4] It is undisputed that the defendants made no attempt to accommodate any of Mr. Brown's religious activities. In those circumstances, the defendants may prevail only if they can show that allowing those activities "could not be accomplished without undue hardship." United States v. Board of Education, 911 F.2d 882, 887 (3d Cir.1990). See also Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1490 (10th Cir.1989), cert. denied, 495 U.S. 948, 110 S.Ct. 2208, 109 L.Ed.2d 535 (1990); Equal Employment Opportunity Commission v. Hacienda Hotel, 881 F.2d 1504, 1512 (9th Cir.1989); and Smith v. Pyro Mining Co., 827 F.2d 1081, 1086 (6th Cir.1987), cert. denied, 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988). Undue hardship is "not defined within the language of Title VII. Thus, the precise reach of the employer's obligation to its employee is unclear under the statute and must be determined on a case-by-case basis." Beadle v. Hillsborough County Sheriff's Department, 29 F.3d 589, 592 (11th Cir.1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2001, 131

L.Ed.2d 1002 (1995). See also Equal Employment Opportunity Commission v. Hacienda Hotel, 881 F.2d at 1512 n. 5, and United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir.1976), cert. denied, 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1092 (1977).

[5] "To require [an employer] to bear more than a de minimis cost . . . is an undue hardship." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 2277, 53 L.Ed.2d 113 (1977). "The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship." Lee v. ABF Freight System, Inc., 22 F.3d 1019, 1023 (10th Cir.1994); see also Brener v. Diagnostic Center Hospital, 671 F.2d 141, 144 (5th Cir.1982). De minimis cost, moreover, "entails not only monetary concerns, but also the employer's burden in conducting its business." Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir.1995), cert. denied, ___ U.S. ___, 115 S.Ct. 2600, 132 L.Ed.2d 846 (U.S.1995); see also United States v. Board of Education, 911 F.2d at 887.

[6][7][8] Any hardship asserted, furthermore, must be "real" rather than "speculative," Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir.1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2963, 125 L.Ed.2d 663 (1993), "merely conceivable," or "hypothetical," Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir.1981), cert. denied, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). See also Toledo, 892 F.2d at 1492; Smith, 827 F.2d at 1086; and Brown v. General Motors Corp., 601 F.2d 956, 961 (8th Cir.1979). An employer "stands on weak ground when advancing hypothetical hardships in a factual vacuum." Brown, 601

F.2d at 960. "Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts." Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397, 402 (9th Cir.1978), cert. denied, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); see also Draper v. United States Pipe and Foundry Co., 527 F.2d 515, 520 (6th Cir.1975). "Undue hardship requires more than proof of some fellow-worker's grumbling. . . . An employer . . . would have to show . . . actual imposition on co-workers or disruption of the work routine." Burns v. Southern Pacific Transportation Co., 589 F.2d 403, 407 (9th Cir.1978), cert. denied, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); see also Draper, 527 F.2d at 520-21.

The first reprimand to Mr. Brown was precipitated by the internal investigation into religious activities conducted in mid-1990. The investigation revealed four actions attributed to him -- directing a secretary to type his Bible study notes, allowing prayers in his office before the start of the workday, allowing prayers in his office during department meetings, and affirming his Christianity and referring to Bible passages about slothfulness and "work ethics" during one department meeting. We consider each of those activities in light of the commands of Title VII.

[9] The defendants argue that allowing Mr. Brown to direct a county employee to type his Bible study notes would amount to an undue hardship on the conduct of county business, since the work that that employee would otherwise be doing would have to be postponed, done by another employee, or not done at all. We agree that such an activity creates more than a de minimis cost to the defendants. See, e.g., Lee, 22 F.3d at 1023, and

Brener, 671 F.2d at 144. We conclude, therefore, that the defendants may not be held liable under Title VII for their actions in relation to that activity.

[10] Nor, by the way, do we believe that the defendants' actions with respect to that activity violate the free exercise clause. That is because we do not consider precluding Mr. Brown from directing a county employee to type his Bible study notes to be a "substantial[ ] burden" upon his religious practices. Employment Division v. Smith, 494 U.S. 872, 883, 110 S.Ct. 1595, 1602-03, 108 L.Ed.2d 876 (1990). See also Wisconsin v. Yoder, 406 U.S. 205, 220, 92 S.Ct. 1526, 1535-36, 32 L.Ed.2d 15 (1972), and Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963). We would be surprised if directing a county employee to type Bible study notes is "conduct mandated by religious belief," Thomas v. Review Board, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981), and, indeed, Mr. Brown does not so contend. We conclude, therefore, that Mr. Brown's directing a county employee to type his Bible study notes was not an activity protected at all under the law in this case and, accordingly, that the defendants may not be held liable for their actions with respect to that activity.

[11] With respect to Mr. Brown's allowing prayers in his office before the start of the workday, nothing in Title VII requires that an employer open its premises for use before the start of the workday. Nor, incidentally, would the first amendment so require in this case, since no proof was offered that Mr. Brown's office was a public forum or a limited public forum or that the defendants allowed employees to use their offices for personal purposes before the start of the workday (indeed, the defendants'

position was that once an employee arrived at the office, the workday began, regardless of the actual time, and the defendants' policy manual directed that no personal use of county resources was permitted). See, e.g., United States v. Kokinda, 497 U.S. 720, 725-27, 729-30, 110 S.Ct. 3115, 3118-20, 3121-22, 111 L.Ed.2d 571 (1990) (plurality opinion). See also United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981), and Widmar v. Vincent, 454 U.S. 263, 268 n. 5, 277, 102 S.Ct. 269, 273-74 n. 5, 278, 70 L.Ed.2d 440 (1981). We conclude, therefore, that Mr. Brown's allowing prayers in his office before the start of the workday was not an activity protected at all under the law in this case and, accordingly, that the defendants may not be held liable for their actions in relation to that activity.

[12] Mr. Brown also allowed prayers in his office during several department meetings and affirmed his Christianity and referred to Bible passages related to slothfulness and "work ethics" during one department meeting. All of the testimony was that the prayers were entirely voluntary and "spontaneous," "did not occur regularly," and dealt with "matters related to Polk County business," and that Mr. Brown's affirmation of Christianity and reference to Bible passages on slothfulness and "work ethics" occurred during only one meeting. Given their context, all of those actions may well have been impolitic on Mr. Brown's part, but we think that they were inconsequential as a legal matter, especially since they were apparently spontaneous and infrequent.

The defendants argue that allowing spontaneous prayers, occasional affirmations of Christianity, and isolated references to Bible passages would amount to an undue hardship on the conduct of county business by virtue of eventual polarization between born-again Christian employees and other employees, and a concomitant perception that Mr. Brown "might favor those with similar beliefs" in making personnel decisions. In support, the defendants point to the county administrator's testimony about "certain contacts with the personnel department by employees of [Mr. Brown's] department" related to "concerns" about the possible effect of Mr. Brown's religious beliefs on his personnel decisions. The county administrator also testified that when "a number of articles" appeared in the local newspaper in mid-1990 about the investigation into religious activities in Mr. Brown's department, "various people in Polk County Government" made those articles "a point of conversation," from which the county administrator "discern[ed] . . . that the atmosphere of religion that had pervaded the information services department hurt the morale of that department." He conceded, however, that he had received no complaints himself from employees "directly" and had not himself "personally . . . witness[ed] uncomfortableness between those who were Christians and [those who were] non-Christians." A supervisor in Mr. Brown's department testified only that she had "heard" that "some people . . . were concerned" about the possible effect of Mr. Brown's religious beliefs on his personnel decisions.

No evidence whatsoever was presented from employees in Mr. Brown's department, however, or from anyone else, for that matter, to show that Mr. Brown's

personnel decisions actually were affected by his religious beliefs or that employee concerns in that respect were either reasonable or legitimate. The investigation report, furthermore, stated only that Mr. Brown's religious activities had the "potential effect " (emphasis supplied) of "generating an impression of preference for those who share similar beliefs" and of "polarizing staff." The county administrator testified, moreover, that he never believed that Mr. Brown showed any "favoritism" or "actually did discriminate against anybody on the basis of their religion"; a former employee from Mr. Brown's department testified to the same effect. Finally, three other employees testified that although there was "a division in the office between Christians and those who were not Christians," "it really had no effect on the work," and that any morale problems in Mr. Brown's department stemmed from "disagreements about how [the work] should be done" and whether the department should be reorganized rather than about "religious issues."

In our view, the defendants' examples of the burden that they would have to bear by tolerating trifling instances such as those complained of are insufficiently "real," Cook, 981 F.2d at 339, and too "hypothetical," Tooley, 648 F.2d at 1243, to satisfy the standard required to show undue hardship. The defendants showed no "actual imposition on co-workers or disruption of the work routine," Burns, 589 F.2d at 407, generated by occasional spontaneous prayers and isolated references to Christian belief. On this record, we hold that the defendants failed to prove that accommodating such instances as they objected to would lead to undue hardship. See,

e.g., Cook, 981 F.2d at 339, and Brown, 601 F.2d at 961. The defendants may be held liable, therefore, for firing Mr. Brown on account of those activities unless the defendants can prove that they would have fired him regardless of those activities. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 244-46, 252-53, 258, 109 S.Ct. 1775, 1786, 1787-88, 1791-92, 1794-95, 104 L.Ed.2d 268 (1989) (plurality opinion).

The district court held that Mr. Brown had offered no direct evidence that he was fired on account of his religious activities. See Brown, 832 F.Supp. at 1313, 1313 n. 16. We do not understand that conclusion, since, as we have already noted, the county administrator himself testified that the first reprimand, which was based on religious activities, was "a factor" in his decision to fire Mr. Brown. See, e.g., Sargent v. Paul, 16 F.3d 946, 948 (8th Cir.1994). We believe that Mr. Brown presented enough evidence to require the application of a "mixed-motives" analysis instead. Price Waterhouse, 490 U.S. at 252, 109 S.Ct. at 1791-92 (plurality opinion).

In these circumstances, we could remand to the district court for findings on the question of whether the defendants proved that they would have fired Mr. Brown even if they had not considered his religious activities. See, e.g., Stacks v. Southwestern Bell Yellow Pages, 996 F.2d 200, 202-03 (8th Cir.1993) (per curiam). In this case, however, we hold that it would be futile to do so, since no reasonable person could conclude from the evidence presented that the defendants proved that they would have fired Mr. Brown anyway. Indeed, when asked specifically at trial if Mr. Brown would have been fired absent the first reprimand, the county administrator responded,

"I wouldn't want to speculate on that. . . . I just don't know." The defendants point to no evidence that would allow us to conclude that they met their burden under a mixed-motives test, and our independent examination of the record has revealed none. See, e.g., Price Waterhouse, 490 U.S. at 242, 244-46, 252-53, 258, 109 S.Ct. at 1786, 1787-88, 1791-92, 1794-95 (plurality opinion). We therefore reverse the judgment on the statutory religious discrimination claims and remand the case to the district court for consideration of the appropriate relief on those claims. See, e.g., Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1327 (8th Cir.1994).

IV.

[13] We last consider constitutional claims that Mr. Brown did not link to his termination. We reverse the district court with respect to those claims and remand the case for consideration of the appropriate relief.

We are mindful (as the dissenting judges are) that our cases, and first amendment jurisprudence in general, require that plaintiffs in cases like this must show that the governmental action complained of substantially burdened their religious activities. (We take this to mean that Mr. Brown must show that the burdens placed on him were not inconsiderable.) We have already said as much in a previous section of this opinion. But Mr. Brown has carried that burden. From Mr. Brown's testimony, there can be no doubt that his religious beliefs are extremely important to him and play a central role in his life. He

testified that in 1986 or early 1987 he underwent a personal spiritual revival that was "a life-changing experience" for him. He stated, in addition, that prayer was "something that's part of [his] being," that prayer "leads [him] and . . . guides [him]," and that he uses prayer in his life "on a daily basis." He believes, according to his testimony, that prayer "changes things" and, furthermore, that his God expects him to pray "for governments, our nation, our schools, our children, all the pandemic problems inherent in our society." There was no challenge to this testimony then or now, and all of the evidence points to a conclusion that Mr. Brown found the defendants' prohibitions oppressive and vexatious.

In these circumstances, the district court's observation that Mr. Brown did not show "that the removal of religious items from his office inhibited his ability to freely exercise his religion," **Brown v. Polk County,** Iowa, 832 F.Supp. 1305, 1316 (S.D.Iowa 1993), either proceeds from a misunderstanding of what a substantial burden is, or is a clearly erroneous finding of fact. Our observation above that some of Mr. Brown's religious activities were inconsequential was, of course, meant to indicate that they did not produce even an insignificant external effect in the workplace, not that they were not significant to him.

Mr. Brown first asserts that his first amendment right to the free exercise of his religion was violated when the county administrator ordered him to "cease any activities that could be considered to be religious proselytizing, witnessing, or counseling" while he was on the job. Although the free exercise of religion is certainly a fundamental constitutional right, see, e.g., Johnson v. Robison,

415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 1169 n. 14, 39 L.Ed.2d 389 (1974), we believe that the Supreme Court might well adopt, for free exercise cases that arise in the context of public employment, an analysis like the one enunciated in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). That case dealt with free speech rather than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of Pickering to the case at hand.

Pickering recognizes a public employee's right to speak on matters that lie at the core of the first amendment, that is, matters of public concern, so long as "the effective functioning of the public employer's enterprise" is not interfered with. Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315 (1987). The kind of speech that Polk County prohibited in this case lies right at the core of the free exercise clause. We have, moreover, already indicated at some length our belief that the record reveals no diminution whatever in the effectiveness of governmental functions fairly attributable to anything that Mr. Brown did that is forbidden by the order. The order therefore fails to find any justification under well-settled principles governing the constitutional rights of public employees.

We may concede for the sake of argument that Polk County has a legal right to ensure that its workplace is free from religious activity that harasses or intimidates. But any interference with religious activity that the exercise of that right entails must be reasonably related to the exercise of that right and must be narrowly tailored to its

achievement. See, e.g., Thomas v. Review Board, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981). Here, there was not the least attempt to confine the prohibition to harassing or intimidating speech. Instead, Polk County baldly directed Mr. Brown to "cease any activities that could be considered to be religious proselytizing, witnessing, or counseling" (emphasis supplied). That order exhibited a hostility to religion that our Constitution simply prohibits. It would seem to require no argument that to forbid speech "that could be considered" religious is not narrowly tailored to the aim of prohibiting harassment, although it is certainly capable of doing that. If Mr. Brown asked someone to attend his church, for instance, we suppose that that "could be considered" proselytizing, but its prohibition runs afoul of the free exercise clause. Similarly, a statement to the effect that one's religion was important in one's life "could be considered" witnessing, yet for the government to forbid it would be unconstitutional.

The defendants would have us hold that their "interest" in avoiding a claim against them that they have violated the establishment clause allows them to prohibit religious expression altogether in their workplaces. Such a position is too extravagant to maintain, for it gives a dominance to the establishment clause that it does not have and that would allow it to trump the free exercise clause. One might just as well justify erecting a cross and a creche on county property at Christmas as a means of avoiding a claim that employees had been denied their free exercise rights. The clauses cannot, in the nature of things, make conflicting demands on a government, and

government is charged with making sure that its activities are confined to the ample and well-defined space that separates them.

Mr. Brown also complains about the directive to remove from his office all items with a religious connotation, including a Bible that was in his desk. It is here, perhaps, that the zealotry of the county administrator is most clearly revealed. Mr. Brown had to remove a plaque containing the serenity prayer ("God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference"), another that said, "God be in my life and in my commitment," and a third containing the Lord's Prayer. Most intrusive of all was the order to take down a poster that proclaimed some non-religious inspirational commonplaces that were deemed inappropriate because their author, although he occupied no religious office, had "Cardinal" in his name. Mr. Brown testified that he was told that these items had to go because they might be considered "offensive to employees."

Our observations above with reference to the application of the principles of Pickering apply with equal force to this second portion of Mr. Brown's claim. There was no showing of disruption of work or any interference with the efficient performance of governmental functions sufficient to allow for this extraordinary action on the part of Polk County. We emphasize, moreover, that even if employees found Mr. Brown's displays "offensive," Polk County could not legally remove them if their "offensiveness" was based on the content of their message. In that case, the county would be taking sides in a religious dispute, which, of course, it cannot do under either the

establishment clause or the equal protection clause. If the "offensive" character of the display ran to a well-grounded apprehension among employees of discriminatory treatment by Mr. Brown, then this case might be entirely different. But the evidence will not support such a finding here. We emphasize, too, that fear alone, even fear of discrimination or other illegal activity, is not enough to justify such a mobilization of governmental force against Mr. Brown. The fear must be substantial and, above all, objectively reasonable. A phobia of religion, for instance, no matter how real subjectively, will not do. As Justice Brandeis has said, rather starkly, "Men feared witches and burnt women." Whitney v. California, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

V.

For the reasons indicated, we affirm the judgment of the district court in part, we reverse it in part, and we remand for further proceedings consistent with this opinion.

FAGG, Circuit Judge, dissenting, joined by LOKEN, HANSEN, and MURPHY, Circuit Judges.

The Court ignores a major defect in proof on Brown's free exercise claim and takes over the district court's fact-finding function on Brown's statutory claim of religious discrimination. I thus respectfully dissent.

It is well-established that to prove a free exercise violation, a religious adherent must initially show the challenged governmental action burdened the adherent's

religious practices. Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 564 (8th Cir.1988); Vernon v. City of Los Angeles, 27 F.3d 1385, 1392-93 (9th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 510, 130 L.Ed.2d 417 (1994). The burden must be substantial rather than a mere inconvenience. Vernon, 27 F.3d at 1392-93. To rise to the level of a substantial burden, the governmental action must either pressure the religious adherent to commit an act the religion forbids, or prevent the adherent from engaging in conduct the religion requires. Id. at 1393 (applying substantial burden requirement to decide Free Exercise Clause not violated by investigation of whether police chief's religious views impermissibly affected his work performance).

Although the Court recognizes the substantial burden requirement, ante at 656, the Court ignores Brown's failure to show the County's actions rose to the level of a substantial burden on his religious practices. The record lacks any evidence that Brown's born-again Christianity required him to display religious items in his office or to engage in the religious activities restricted by the reprimand. Indeed, the district court found Brown did not prove the removal of the items from his office inhibited his ability to exercise his religion freely. 832 F.Supp. at 1316. "Brown does not dispute the [district] court's factual findings" with respect to his First Amendment claims. Brief for Appellant at 5. The district court's finding is not clearly erroneous anyway. As for the religious activity restrictions, the Court recognizes the prayers at departmental meetings were spontaneous, infrequent, and inconsequential. Ante at 656. The evidence about the change in Brown's religious practices after the reprimand

shows the restrictions merely inconvenienced Brown. Rather than engaging in group prayers during work, Brown simply went across the street to the library at lunchtime to read his Bible and pray with others. The reprimand did not restrict Brown's private prayers. Brown has not shown any substantial, concrete harm to his religious practice resulted from Polk County's actions. The Court misplaces reliance on evidence that Brown's "religious beliefs are extremely important to him and play a central role in his life." Ante at 658. The fact that Brown sincerely held his religious beliefs does not mean the County's actions substantially burdened Brown's exercise of those beliefs. Because Brown failed to show the County's actions substantially burdened his religious practices, the Court should not even reach the Pickering analysis on Brown's free exercise claim. See Vernon, 27 F.3d at 1395. As explained in the vacated panel opinion, however, I would hold the balance of interests tips in the County's favor in this case, primarily given Brown's status as a supervisor of fifty employees. See 37 F.3d at 408-10.

Assuming the mixed-motives analysis applies to Brown's statutory religious discrimination claim, I would remand for the district court to decide whether the County would have fired Brown absent his religious activities. In making the finding on appeal, the Court disregards the timing of Brown's discharge and the evidence showing Brown's consistently poor work performance. In my view, the district court could reasonably find the County would have discharged Brown regardless of his religious activities.

After the County administrator, Ray Sears, chose Brown to become director of the County's information services department (ISD) in mid-1986, the ISD experienced many problems. In Brown's 1988, 1989, and 1990 performance evaluations, Sears expressed concern with Brown's ability to communicate, delegate authority, and maintain predetermined schedules. The ISD experienced significant delays in meeting project deadlines in late 1989, prompting an unprecedented departmental evaluation by an outside consulting firm and a departmental restructuring. In July 1990 Brown received the single reprimand for religious activity at work and Sears removed the items from Brown's office. No religious activities were reported after the reprimand. Four months later, in November 1990, Sears reprimanded Brown for exercising poor judgment about budgetary matters. The same month, Sears ordered an investigation into reports that ISD computers were still being used for personal matters even though Brown had tried to eliminate the problem. The investigation revealed ISD computers contained pornography and personal budgets. Sears asked for Brown's resignation after receiving the results of the computer investigation on December 3, 1990.

The Court places too much stock in Sears's testimony that he did not know whether Brown would have been fired absent the reprimand for religious activities. Ante at 657-58. Sears's statement is equivocal and must be considered in light of the entire record. Given the overwhelming evidence of inadequate performance in relation to the single reprimand for religious activity, and the fact that Sears did not terminate Brown until pornography was found on the ISD's computers five months after the

religious reprimand, I believe the district court could reasonably find the County would have fired Brown absent his religious activities.

I would remand Brown's statutory religious discrimination claim, but otherwise affirm the district court.

PETITION FOR REHEARING

INTRODUCTION

Defendants and Appellees Polk County, Iowa, County Administrator Ray Sears and the Polk County Board of Supervisors ("Polk County") respectfully petition the Court for a rehearing pursuant to Fed.R.App.P. and Eighth Circuit Rule 40A. Defendants believe that the majority overlooked several significant issues and misconstrued others. The *en banc* decision of the Court was filed July 31, 1995.

Plaintiff-Appellant Isaiah Brown challenges his termination from employment as director of the Information Services Department of Polk County under Title VII. The majority opinion overturned findings of the district court as clearly erroneous. Based upon a June, 1990, disciplinary action which was only partially invalidated by this Court, the majority held that "from the evidence presented" no reasonable person could conclude that defendants proved they would have fired Mr. Brown anyway. Slip Op. p. 13. However, Polk County was never allowed to present evidence concerning whether it would have terminated Mr. Brown's employment without considering the two incidents this Court invalidated. At a minimum, this case should be remanded to the district court for additional fact findings under the "mixed motives" analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

Likewise, the district court did not have the benefit of the majority's legal findings when it ruled at the trial. The district court, which heard all of the evidence and observed all of the witnesses and received all of the

exhibits, should be given a chance to perform its designated function – fact finding – now having the benefit of the majority's legal wisdom.

In addition, the majority totally failed to address the fact that a reasonable accommodation for Mr. Brown's need to engage in group prayer and religious proselytizing was offered by the County and existed throughout Mr. Brown's tenure as head of the computer department. That accommodation is vacation time, personal time, coffee break time and lunch time.

Finally, the majority decision in this case has the necessary effect of requiring an employer to allow an employee to conduct religious activities at work, on "company" time. That decision is in direct conflict with virtually every federal appellate court in the country which has decided cases containing the same or similar issues.

I. THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR ADDITIONAL FACT FINDING.

The majority opinion discussed a June, 1990, reprimand of Mr. Brown at length. (This was one of three disciplinary reprimands received by Mr. Brown). This reprimand consisted of four distinct parts: 1) directing his secretary to type his Bible sutdy notes, 2) allowing prayers in his office before the start of the work day, 3) allowing prayers during department meetings, and 4) making religous statements during a department meeting. The majority found the first two parts to be statutorily and constitutionally permissible, and third and fourth to be impermissible. The majority also said that a

mixed motive analysis pursuant to *Price Waterhouse* was appropriate. (The district court had not applied the mixed motives analysis. *See Brown v. Polk County, Iowa*, 832 F.Supp. 1305, 1311 (S.D. Iowa 1993)).

Then, rather than remand to the district court to perform the *Price Waterhouse* mixed motive analysis, the majority found that Mr. Brown was fired wrongfully. The majority decision focuses almost exclusively on the two impermissible grounds for reprimand and one equivocal statement of the County Manager Sears. That decision bears consideration for two reasons.

First, it sets a dangerous precedent. The majority has decided a case on facts which were not tried in the trial of the case. Mr. Sears was never asked if the two impermissible parts of the June, 1990, reprimand played a role on Mr. Brown's termination, nor was he asked if Mr. Brown would have been terminated despite the two impermissible reasons. Stated conversely, he was never asked if he would have made the decision to terminate Mr. Brown if the 1990 reprimand had been based solely on the grounds upheld by this Court (having a County employee type personal Bible study notes and holding prayer meetings in the work place). At the very least, the case should be remanded to the district court for additional testimony and fact finding upon this important issue. It is unfair to Polk County to deprive it of the opportunity to present evidence under the *Price Waterhouse* "mixed motives" framework after this Court has only partially invalidated the June, 1990, reprimand.

Under the *Price Waterhouse* analysis, it is the duty of the district court to make fact findings whether the case is

a mixed motives case. *See, e.g., Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200, 202 (8th Cir. 1993). Because this Court has overturned the district court's decision on this issue, the case should be remanded to the district court for findings consistent with the Court's opinion. *Id.* This is especially true where, as here, new legal standards are imposed. In such cases the matter should be remanded to the district court. *Kush v. Rutledge*, 416 U.S. 717 (1983). The district court has been deprived of the opportunity to be the trier of fact.

Secondly, this Court erred in overturning the district court's fact finding on the Title VII isue as clearly erroneous. *See* Slip Op. pp. 3-13. " 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind their function is not to decide factual issues *de novo.*' " *Anderson v. City of Bessemer City, S.C.*, 470 U.S. 570, 573 (1985) (citations omitted). *See also Tuttle v. Henry J. Kaiser Co.*, 921 F.2d 183, 185-86 (8th Cir. 1990); *Griffin v. City of Omaha*, 785 F.2d 620, 626 (8th Cir. 1986). Appellant has the burden of persuading the appeals court that findings of fact are clearly erroneous. 9A Wright, Miller & Cooper, Federal Practice and Procedure Civil 2d §2585 (1995).

In this case the appellant did not challenge the district court's fact findings. *See* Appellant's Br., p. 5. Nevertheless, the majority overturned them as clearly erroneous. Slip Op. pp. 3-13. In doing so, the majority has ignored a plethora of facts regarding Mr. Brown's inability to manage the Information Services Department. There are dozens of exhibits, from chronically troublesome performance appraisals to missed deadlines to the

need for an entire department-wide reorganization to reams of explicit pornography being stored on county computers. Indeed, part of the June 1990 reprimand which was found impermissible by the majority, cautioned Mr. Brown to make sure religion did not improperly intrude into the ISD workplace and that any further such intrusion might be grounds for dismissal. The November 1990 investigation into improper computer usage discovered religious materials improperly stored on the computer. Those and more facts were simply ignored.

To usurp the fact finding powers of the District Court on the basis of one written reprimand (the first of three he received before the pornography was discovered and he was discharged) when fully half the issues in the reprimand were permissible is unprecedented. The defendants respectfully request the Court to consider its position and remand the case to trial court for additional fact finding.

II. A REASONABLE ACCOMMODATION PRE-EXISTED FOR COUNTY EMPLOYEES WHO WANTED TO CONDUCT RELIGIOUS OBSERVANCES DURING WORKING HOURS.

The majority says no accommodation was offered Mr. Brown for those times when he wished to engage in spontaneous group prayer or religious proselytizing. To the contrary, the County had a generous leave policy and other times built into the workday for personal business which accommodated Mr. Brown's needs reasonably as a matter of law.

Mr. Brown was entitled to 25 vacation days per year. (See Exhibit 32, p. 4). Mr. Brown was entitled to 5 personal days per year. (See Exhibits 19, 64, M; p. 7). Mr. Brown was allowed to request leave without pay. (See Exhibit 32, p. 7). Mr. Brown was entitled to two coffee breaks per day of 15 minutes each. (See Exhibits 19, 64, M; p. 4). Mr. Brown was entitled to one hour for lunch per day. (See Exhibits 19, 64; p. 4).

The leave policies of an employer which allow an employee to take time off for religious reasons are reasonable accommodations. *Ansonia Bd. of Ed. v. Philbrook* 479 U.S. 60 (1986); *Getz v. Comm. of Pennsylvania, Dep't of Public Welfare,* 802 F.2d 72, 74 (3rd Cir. 1986); *Pinsker v. Joint District No. 28J of Adams and Arapahoe Counties,* 735 F.2d 388, 390-391 (10th Cir. 1984).

III. REQUIRING AN EMPLOYER TO ALLOW AN EMPLOYEE TO CONDUCT RELIGIOUS ACTIVITIES AT WORK, ON "COMPANY" TIME AND TO PAY THE EMPLOYEE FOR THE TIME SPENT ON RELIGIOUS ACTIVITIES, IS AN UNDUE BURDEN UPON THE EMPLOYER AND IN DIRECT CONFLICT WITH ALL SIMILAR APPELLATE DECISIONS.

The net effect of the majority's holding is that Mr. Brown gets paid for engaging in spontaneous group prayer and religious proselytizing while he was supposed to be working. This unprecedented holding (especially for a government employer subject to the Establishment Clause) is in direct conflict with every federal appellate court which has considered the issue, including a previous decision of this Court. *See: Ansonia Bd. of Ed.*, supra;

Getz, supra; *Pinsker*, supra; *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982); *Wisner v. Truck Cent., a Subsidiary of Sanders Leasing System*, 784 F.2d 1571 (11th Cir. 1986); *Hudson v. Western Airlines, Inc.*, 851 F.2d 261 (9th Cir. 1988); *Philbrook v. Ansonia Bd. of Ed.*, 757 F.2d 476 (2nd Cir. 1985).

Not one of the above cases even considers allowing an employee to conduct religious activities at work, on work time, and get paid for conducting religious activities. The cases do allow an employee to conduct religious activities at a time when he or she would otherwise be at work, but the cases all require the employee to take paid leave or unpaid leave or arrange a shift swap or something similar.

In short, the majority opinion in this case is unprecedented.

CONCLUSION

Defendants pray the court to reconsider the majority decision and affirm the district court. In the alternative, defendants pray the Court to reconsider the majority decision and remand the case to the district court for additional fact finding.

Respectfully submitted,

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